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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 895

JOHN ROBINSON, ET AL.,
Petitioners,

vs.

HUMBLE OIL AND REFINING COMPANY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

This petition is filed by John Robinson (and his wife as a nominal party only, Freddie Robinson) and his brother Frank Robinson, Jr., land owners, and J. L. Tillery, a mineral owner, citizens of the United States, they having been the Appellants in this cause wherein the Supreme Court of the State of Mississippi rendered judgment on the 14th day of June, 1965, which was made final beyond further review of October 11, 1965, by the final disposition the Suggestion of Error relative to said judgment. Said parties are hereinafter referred to as Petitioners. In the trial court they sought to clear their title to a certain tract of land owned by them in Adams County, near

Natchez, Mississippi, but relief was denied and the decree of the trial Court took from them their said lands and awarded same to the adverse defendants. Said decree was affirmed upon appeal.

The Respondents are all the other parties, all named as defendants in the original proceeding. All were represented by counsel except Charles H. Perrault, Jr., who appeared for himself and who was technically realigned as a complainant. Most of the defendants were represented by counsel of their own choice, but for all of them, not otherwise represented, the case was treated by the trial judge as a class suit, and an attorney's fee was allowed for labors of counsel for the other defendants in the general behalf, to be paid out of accumulated oil funds available in the proceeding.

The Respondent oil company, Humble Oil & Refining Company, hereinafter sometimes called Humble, named as one of the original defendants was not and is not an "adverse" party but a stakeholder, expressing willingness to pay the royalty funds from the lands in controversy to such party or parties as may be finally adjudged to be entitled thereto. Petitioners have no dispute with Humble but sought to have the said accrued funds paid to them as having been derived from their lands.

The Respondents who were the Appellees in said matter in the Mississippi Supreme Court (except Perrault and Humble, above mentioned) were numerous, whose names are as follows: Rebecca Bailey, Jennie Foster, Forea Mazique, Corinne Mazique, City Bank & Trust Company, Joseph F. Dixon, Mary Blake Gorman, S. B. Laub, Universal Homes Support of America, Inc., Elizabeth Lewis Blake, Harry W. Elliott, S. H. Lambdin, R. C. Feltus, H. W. Carter, R. Lee Parker, Jr., M. M. McGowan, Joseph

H. Howie, Eileen Gates Hunt, J. F. Vaughan, F. H. Shortridge, W. B. McCarty, Heirs of W. H. Holman, who are, W. H. Holman, Jr., Mrs. W. H. Holman and Mrs. Marie H. Van Hecke, Board of Deacons of Vicksburg Presbyterian Church, R. L. Dent, Mrs. E. C. Ward, Mr. M. E. Ward, Eleanor R. Wallace, Lorena Gardner Hennington, Lehlia Hennington, Glenn O. Briscoe, Ruth Fletcher, Armstead Mazique, Rudolph Mazique, Sula M. Grant, John B. Atkins, Roy Field, Hunter Jones, R. J. St. Germain, Kenneth Leith, Elizabeth Leith, Mary Gordon Leith, W. W. Blocker, W. G. Green, Quinton Little, Charles H. Osmond, Myra Blake Schuler, R. E. Welch, Lester Settegast, L. B. Herring, Mary Ann Terzia, Paul U. Nones, J. B. Williamson and/or Mrs. J. B. Williamson, W. C. Spooner, A. R. Wherritt, Paul B. Wittman, Martha W. Schober, Southland Royalty Company, Cascade Petroleum Company, Midwest Oil Corporation, all unknown heirs or devisees of Anna F. C. Martin and all unknown parties claiming or asserting any interest.

Petitioners pray that a Writ of Certiorari issue to the Supreme Court of the State of Mississippi to review its said judgment affirming the Decree of the Chancery Court of Adams County, Mississippi in this cause whereby the lands of Petitioners were taken from them, the said trial court Decree having been affirmed by the Supreme Court of Mississippi on June 14, 1965, and having been finally disposed of beyond further consideration, by said Supreme Court of the State of Mississippi on October 11, 1965, by decision of said Court on Suggestion Of Error in the matter.

A.

OPINIONS BELOW

Copy of the opinion of the Supreme Court of Mississippi rendered herein on June 14, 1965, is annexed hereto as Appendix "A". It is unreported officially but appears in the Southern Reporter as John B. Robinson, et al v. Humble Oil & Refining Company, et al, 176 So.2d page 307. The Judgment of the Supreme Court of Mississippi was rendered on June 14, 1965 and copy is annexed hereto as Appendix "B". The Suggestion of Error was overruled by the Supreme Court of Mississippi on October 11, 1965 but three of the Judges (of eight—the ninth judge not taking part) dissented and would have reversed the cause in favor of Petitioners (the Appellants), and copy of their opinions, including the final decision of the Court, is annexed hereto as Appendix "C". Not yet officially reported, it appears unofficially in 178 So.2d page 863. Also, the judgment of the Supreme Court of Mississippi, upon the Suggestion of Error, was rendered on October 11, 1965. Copy thereof is annexed as Appendix "D". Copy of the decree of the trial court is annexed hereto as Appendix "E".

B.

JURISDICTIONAL GROUNDS

The decree of the Chancery Court of Adams County, Mississippi dated the 7th day of February, 1964 entered in that Court on said date, is that reviewed by the Supreme Court of the State of Mississippi and affirmed by the judgment of said Court, and finally disposed of by the

overruling of Suggestion of Error on October 11, 1965, as above mentioned.

The statutory provision believed to confer on this Court jurisdiction to review the decree in question by Writ of Certiorari is Section 1257 (3) and Section 2101 (C), 28 United States Code, copies of which are shown as Appendix "F" hereto.

C.

QUESTIONS PRESENTED FOR REVIEW

(1) Under SECTION 1 of the Fourteenth Amendment to the Constitution of the United States the Petitioners were entitled to due process of law.

The decision of the Chancery Court of Adams County, sitting in Natchez, Mississippi, sustained by affirmance upon appeal to the Supreme Court of the State of Mississippi, in this cause operates to take property from a small negro holding, and transfer it to a large adjoining plantation, without due process of law in various particulars. First, the record does not show any possession of the disputed land area by, for or in behalf of the Respondents since the year 1885, and particularly none since 1916, and does show possession by Petitioners and their predecessors in title since that time. As to this the Supreme Court of Mississippi recognized in its opinion, that . . . "the evidence reflects, with two exceptions, that complainants and their predecessors in title have used this area in dispute for many years in excess of the statutory period." . . . But recovery by the complainants, even of a small part of their land was denied for alleged failure to show the exact perimeter of the lands owned and ac-

tually possessed by Petitioners, though possession was by cultivating and all other usual acts of possession of such farm land throughout the years. The "two exceptions" mentioned referred to timber cuttings in the years 1947 and 1953 for a few days each, alleged to have been made by loggers cutting timber on the adjoining plantation. The Mississippi Supreme Court declined to follow previous cases, having become rules of property in the State, recognizing that possession, or adverse possession extends to the calls of the deed where one party is in actual possession or occupancy of the area in dispute.

(2) Also, under SECTION 1 of the said Fourteenth Amendment to the Constitution of the United States the Petitioners were here deprived of the equal protection of the laws of the State of Mississippi.

The Chancery Court of Adams County, at Natchez, Mississippi, as upheld by the Supreme Court of Mississippi denied to petitioners the equal protection of the law in that these negroes who occupied and cultivated the lands in dispute, without let or hindrance, for some 27 years after their parents' acquisition by their title deed, (and with their predecessors, since 1885) were denied the application of that which had theretofore been the Mississippi law and with the exception of this case is still the law. The law was changed, in this particular case, denying property rights which have been and are accorded members of the white race, and all other persons as well, now and heretofore. Undisputed and uncontradicted evidence, conclusive on the matter of possession and title was arbitrarily disregarded by the trial court in this case, this being a radical departure from the equal protection of the law which should have been accorded. Also the rule of property which should have been applied equally to the petitioners, as well as all other persons, regardless of race,

by the Chancery Court of Adams County, sitting in Natchez, Mississippi, was not applied equally but petitioners were denied the equal protection of the law in their property rights, as shown by the undisputed portions of the record here.

(3) Further under SECTION 1 of said Fourteenth Amendment both due process of law and the equal protection of the law, assured to citizens of the United States by said Fourteenth Amendment was denied in that undisputed evidence introduced on the witness stand in the trial showed "plain facts" (which should have been controlling) which were ignored or rejected by the trial court and by the Supreme Court of Mississippi in reaching the decisions here sought to be reviewed. The dissenting opinions of three Supreme Court Justices, shown in Appendix "C", above mentioned, show beyond question that the trial court and said appellate court failed and refused to give the Petitioners (the complainants below) the benefit of the obvious and unquestioned evidence on the controlling questions as to possession. Also both courts ignored and rejected the boundary line plat which was introduced in evidence by *defendants*, with consent, by *stipulation of all parties*, showing both the precise boundary line and the precise acreage in dispute, even to the thousandth part of an acre. This was General Exhibit III introduced by counsel for defendants (R. 454). Thus the stipulated and unquestioned boundary line and acreage exhibit, agreed to by the parties (*all parties*) in the trial court, when rejected by the courts, shows denial of due process and denial of equal protection of the law under said Fourteenth Amendment.

D.

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

There is annexed hereto, as Appendix "G" a full copy of SECTION 1 of the Fourteenth Amendment to the Constitution of the United States, which this case involves, and upon which this Petition is based.

E.

STATEMENT OF THE CASE

Petitioners are Negroes (except the mineral interest owner Tillery) who own property out from Natchez, Adams County, Mississippi. Respondents are large plantation owners whose lands adjoin Petitioners'. Humble Oil and Refining Company owns the leases on both properties and is the stakeholder of a little better than $82,000.00. For many years the said Robinsons owned and had possession of the lands in controversy without dispute or question, on down to the time oil was discovered, in 1952. Even then for another decade, no claim was filed by the plantation owners in Court. They disputed ownership by record claim in Court only after the filing of this suit by Petitioners who were still in full possession of the land. They were seeking to get their oil royalties.

Second Creek is a non-navigable stream that in 1885 was the dividing line between the properties. The Petitioners' lands were a part of the property partited by Charles Babbitt, C. E., in 1885, being Lot 5 and 13 acres off the Southeast corner of Lot 3, Partition Suit No. ..... in the

Chancery Court of Adams County, Mississippi. The metes and bounds and footage of this property were set up and the same description was used from the initial survey down to the present time in all the deeds in the chain of title. The large plantation to the East of their property was shown to be 1350 acres. Petitioners' land had some 280 acres. If the decision of the Supreme Court of Mississippi stands, the plantation will be enlarged by at least 50 acres. The plantation landowners did not and would not come into Court personally to claim the land or the money, nor were their pleadings sworn to by them. Not one of them appeared in person, but they appeared only through counsel. They are the ones thus unjustly enriched in their absence.

Second Creek has moved to the West of where it was in 1885. The maps all show a change. A survey made by Humble to determine the line shows the bed of the Old Creek as it existed in 1885. This is also clear in General Exhibit III in this cause, introduced by *defendants* by *consent* of all parties.

The petitioners and their predecessors in title have farmed the lands East of the Creek. This is their bottom lands, lands for making the cotton, corn and peas for the balance of the farm. No one questioned their right and no one has *ever* interfered with them in this up to the trial. The area they were farming was within the call of the ancient Partition Deeds, lands they claimed, lands they paid taxes on, and lands used for their livelihood.

After oil was discovered in the immediate neighborhood, Humble started a well on some of this land East of the present Second Creek, and John Robinson, one of the Petitioners, advised the Company that they were on his and his brother's lands. The Company immediately with-

drew the well from the bottoms up to the hills of the plantation. Various units were set up by Humble for the purpose of draining the area in dispute. Two wells were later sunk on the land itself. The Humble impounded all of the royalties that might be in dispute and requested that a suit be filed to determine the ownership.

The petitioners attempted to get counsel in Natchez, Mississippi to represent them in this matter, but they were unable to do so.

There was no dispute that petitioners and their predecessors in title had been in actual, continuous, open, hostile, notorious and exclusive possession of some, if not all, of the lands in controversy for a period in excess of thirty-two years. There is no dispute as to the corners of the lot in the Partition of 1885 made by Babbitt, and the deeds with that same description since that time, down to the Robinsons, here described the *"1885" location* of the creek as the eastern boundary.

There would have been no controversy had oil not been found, as the Court found in its main opinion. Babbitt in 1901 made a report to the Board of Supervisors about Second Creek, stating that it needed drainage. A bridge was built in 1907 across Second Creek and work with mules and slips and plows was done on the Creek. There were some changes in the Creek as a result of these efforts. Some of the witnesses knew when the changes took place and testified to that effect. Chuck Mazique rode the Creek for livestock and knew that the Plantation line was at the foothills and knew the Old Creek fences were on either side. A part of the large Plantation came over on the West side of the Creek, when it shifted, and *they followed it.* They called it the "Island Farm" and farmed it and claimed it as of the present time. Another piece

of land known as Ligon-Mazique went over on the East side of the Creek when it shifted. They *followed it* and farmed it and claim it at the present time. About the same time the property, here in controversy, then known as Mazique property, went East of Second Creek, when it shifted. The owners followed it, and they have farmed it continuously up to the present time, and even in this controversy not a single owner of the Plantation made affidavit or filed sworn pleadings and none appeared in Court to deny the claim of Robinson or to assert their own claim. Petitioners produced witnesses who lived there and knew the facts, but their clear, undisputed testimony was rejected—arbitrarily.

The Minutes of the Board of Supervisors show that a drainage district was created in Second Creek on this area, about 1904 and in fact some of this very property in controversy was sold for drainage tax and later redeemed by Robinson.

The proof of eyeball witnesses was not impeached or challenged by any witnesses who were familiar with the properties, but an expert witness was employed to "explain".

A Mr. Smith, who was an "expert" witness, said he found a flaw in a deed dated October, 1886, and said that proved that the Creek had changed 764 feet to the West and that it had changed very little since that time. That expert witness put the change in Second Creek at appellant's property as having occurred in 1886. This was before the expert was born and before the knowledge of any of the witnesses, but if the Creek changed 746 feet from the date of the Original Survey made by Babbitt in December of 1885, until the date of a deed in October, 1886, it would have been ten months. If there was a change

of 764 feet of the Creek to the West as testified to by the expert witness, then under the law of the State of Mississippi, which is in line with the other states, there would have been a sudden change to the West, readily visible to the naked eye, and this would have been an avulsion, and there would not have been any change of title. This expert said he did not take into consideration that Second Creek had been straightened, or the fact that a drainage district was created that would carry the water off faster. But, Babbitt in his report to the Board of Supervisors of 1901 told how all of the area was flooding. The eye witnesses fix the changes in the boundaries by witnesses who were there and saw it. Mazique's brother came across and farmed the land East of the Creek after the change when the avulsion took place.

The law on this question is clear and beyond dispute, and will be covered fully by briefing if review is allowed.

The only evidence in favor of the large plantation owners was the testimony of Austin Smith limited to his theory of change of the creek by accretion only. Judge Inzer in his dissent (above mentioned) shows and explains how incredible and unreliable Smith's testimony was, not worthy of belief. Justice Rodgers, in his dissent, said in part: "I join in this dissent to hold up a flag to the trial courts, so that they as well as the appellate court may be reminded that the taking of property from one landowner and giving it to another is fraught with danger of injustice, but the court should be very cautious in using a legal fiction as a tool to divest property owners of title to their land." Both these comments emphasize the arbitrary disregard of the vital controlling, undisputed evidence, by the trial court.

The trial court held that the present bounds of Second Creek would be the dividing line between the plantation

and petitioners' land. It held that while the evidence showed possession, it did not mark out the perimeters of possession and that for that reason it would not ripen into title by adverse possession.

Mr. Charles Perrault had purchased some of the royalty from Mrs. Robinson during her lifetime and before there was any drilling in the neighborhood. He in turn had sold some of this interest. After the well came in some of his purchasers, and Mr. Perrault himself with some of his holding, agreed on the "Old Creek Bed" as the dividing line, and this agreement was set up in a deed and is in the pleading. Attorney Ward, representing the plantation owner, stipulated where the "Old Creek Bed" was. The Chancery Court itself in its decree in Adams County, Mississippi, defined where it was, but on the question of adverse possession according to the call of their deeds, the lower court and the majority of the Supreme Court said it was vague, indefinite and uncertain. However, the very exhibit, introduced by Respondents, General Exhibit III, showed the exact area in dispute even to the thousandth part of an acre.

The only reason that the Robinsons did not prevail both in the trial court and in the Supreme Court of Mississippi, on the adverse possession question alone, was that those courts said the proof failed to show the exact boundary and location by way of perimeter, of the lands held by adverse possession and the location of Second Creek in 1885. This denied due process and equal protection of the law in that these Courts failed to accord to these Petitioners the benefit of the undisputed evidence and facts showing with certainty, even by said General Exhibit III *introduced by Respondents* (received, and in effect adopted by all parties) the location and acreage of the lands in dispute. Stipulations of counsel also approved the plat in question and the 1885 location of the Creek.

F.

FEDERAL QUESTIONS, HOW AND WHEN RAISED

The Federal Question, being the pertinency of the said SECTION 1 of the Fourteenth Amendment to the Constitution of the United States, was first raised expressly in the assignment of error filed in the Supreme Court of Mississippi, as the eleventh ground or assignment of error on the appeal to said court, in the following words:

> . . . (11) The Court erred because the decree rendered herein deprives the complainants, appellants, of their property without due process of law, and deprives them of substantive rights without due process of law, contrary to article 3, section 14 of the Constitution of the State of Mississippi and contrary to Amendment or ARTICLE XIV of the Constitution of the United States of America. . . .

The said questions were passed upon by the Supreme Court of Mississippi in its opinion (Appendix A hereto, page A1) in the last paragraph wherein it responded, saying about this assignment of error that it

> . . . "is not well taken as the record reflects the complainants were not deprived of any right and that they were accorded due process of law."

ARGUMENT

The Trial Court Arbitrarily Disregarded the Undisputed Evidence from the Witness Stand and the Supreme Court of Mississippi Failed to Correct That Error and Overlooked the Stipulation of Counsel, and General Exhibit III Showing Boundaries and Acreage of Lands Involved, All Resulting in Denial of Due Process and Equal Protection under the Law

This case concerns two negro brothers, landowners in Adams County, near Natchez, Mississippi, and a white man who was a grantee of a fractional mineral interest in the lands in question, on the one part, as complainants, and numerous white persons (more than 50) as defendants who were adverse mineral claimants, there being some half dozen of the surface owners of an adjoining 1,350 acre plantation included among the defendants. There was a dispute between said parties about ownership of some 50 acres of land, more or less, lying between the 1885 location of a stream called Second Creek, and the 1963 location of said stream, in said Adams County. That alone is nothing special or important, but what is both *special* and *important* is that this property of said negroes, which had been actually occupied and used by them and their parents (to whose title they succeeded) since 1936 (some 26 years) and by their predecessors in title since 1885 (for a total period of over 75 years) were ousted from their title and ownership of said tract by the arbitrary decision of the Chancery Court of Adams County, Mississippi, which ignored and disregarded the undisputed controlling evidence, and even ignored an agreed stipulation by all parties, as to boundaries, acreage and location of the lands in dispute.

In the case of *Brown* v. *Mississippi*, 297 U. S. 278, S. Ct., 80 L. Ed. 682 (1936) this Court observed that an extorted

confession may not be substituted for "the witness stand." That was a criminal case, involving a death sentence, and the conviction was set aside by this Court because of admission of evidence other than from "the witness stand." Admittedly the case at bar concerns only property rights, which do not approach the immediate seriousness of a death sentence. Yet, the Fourteenth Amendment to the Constitution of the United States applies without doubt and expressly to property rights as well as life and liberty.

So, in a cause involving property rights it is just as indispensable that *evidence from the witness stand* should not be arbitrarily disregarded. The story is commonplace about a posse of citizens who were concerned about a fair trial for persons charged with crime. When they caught the suspect they agreed they would immediately give him a fair trial and then take him out and have him hanged. As to property matters such idea of fair trial and justice would be to say that the owner would be given a fair trial and then ousted from the family farm. This is a rough illustration of what happens when a Court ignores evidence before it which is not in dispute and which is controlling on the ownership issue. If Courts do not abide by undisputed evidence then the arbitrary wish of the Court has been substituted for *"the witness stand,"* and constitutional property rights are utterly defeated.

Now, in the years 1962 and following, when this cause has been in the Chancery Court of Adams County, in Natchez, Mississippi, and has continued to this Court, said cause is *special* and *important* and a review of same by this Court now is special and important if property rights of negroes, and of all other citizens are to be given constitutional protection under said Fourteenth Amendment. A review of this cause is now special and important because

in recent years, and emphatically since the filing of this suit, the public policy of this great country is to protect minority races and groups from unequal treatment and from discrimination by Courts. This Court has followed that policy in its decisions and has been strong and ready to promote justice and to protect citizens from arbitrary and unconstitutional action by local courts, particularly in regard to "civil rights." But, if some strong and prompt decision is not made by this Court upon the question of arbitrary decision by trial courts where undisputed and controlling evidence is ignored the door will be open for taking of property from one citizen in behalf of another, without semblance of justice. Incidentally, in the case at bar, not a single adversary defendant testified. Not *one* of the plantation owners even so much as said they had ever set foot upon or even *claimed* the land in controversy. Not a *single one* of them denied in Court that in truth and fact the Petitioners, said (Robinson) brothers, the landowners whose land is here in dispute, and their predecessors in title had been in actual occupancy and possession of the said lands ever since the year 1885. Nor did any adverse defendant plantation owner or other adverse defendant, make *any* affidavit of claim, or even personally sign *any* pleading in this cause. As stated in one of the three powerful dissenting opinions (that by Judge Inzer, of the Mississippi Supreme Court) in the matter (with emphasis added):

> "This case is unusual in that none of the owners of Berkley testified in this case. There is *no evidence that they ever asserted any claim to this land or that they even now claim to be the owners of it.*" (178 So.2d p. 864, 2d col. Appendix C, p. A28)

With all due regard to the Supreme Court of Mississippi it, (through a majority thereof) has here overlooked

the incredible even obvious, arbitrary nature of the decision of the Chancellor, sitting in Natchez, Mississippi, where "civil rights" are in much controversy and where arbitrary action and decision does occur, on occasion.

So, under Rule 19 of this Court, it is clear that the reasons for a review of this case are "special and important," if not to say impelling, so that property rights (as well as civil rights or life and liberty) may be protected from arbitrary disregard and unconstitutional denial by local trial courts, not in Mississippi alone, but throughout our whole great land.

This case does not concern any error of law or error of fact, but an arbitrary disregard of both facts, law and constitutional rights. If the trial court acts thus and disregards constitutional rights, due process of law and equal protection which require that causes be decided on the basis of the *evidence* or testimony which comes from "the witness stand," then the only possible relief any citizen or party may have against arbitrary disregard of such evidence by a trial court, not corrected by the Mississippi Supreme Court, is by coming to this Supreme Court. For many Mississippi citizens it is truly a Court of *last resort*.

Here, the dissenting opinions show that the property of the two negro petitioners, the Robinson brothers, and of their mineral grantee, Tillery, lying in Adams County, Mississippi, has been taken from them, without due process of law and without equal protection under the law of Mississippi. The three separate dissenting opinions of Judge Ethridge, now, in 1966, Chief Justice of the Supreme Court of Mississippi (appendix "C" page A30), of Judge Inzer (appendix "C" page A26) and Judge Rodgers (appendix "C" page A31), show clearly that these Petitioners should have obtained relief and been granted a recovery.

Judge Ethridge said (page A31 of appendix "C") that

> "This result would be in accord with the plain facts. . . . This is the aim of judicial administration". (Emphasis added).

Judge Inzer said (page A28 of appendix "C") that

> "The result of our decision has been to allow a fiction of law to prevail over actual adverse possession. . . ."

Judge Rodgers said (pages A32-A33 of appendix "C"):

> "The facts show beyond question that the eastern landowners never had possession of the twenty-seven acres used by the western riparian proprietor . . . the taking of property from one landowner and giving it to another, is not only fraught with danger of injustice, but the court should be very cautious in using a legal fiction as a tool to divest property owners of title to their land."

Actually what the dissenting Judges might also have said, and of which all Courts in Mississippi and particularly all Courts in Adams County, Mississippi are charged with knowing or having judicial notice, is that negro landowners in Adams County, Mississippi, in the environs of Natchez, Mississippi *do not cross over a substantial stream* and occupy 80 acres, or 50 acres or 27 acres of good "bottom" land belonging to adjacent white plantation owners. And to a moral certainty and beyond question it could never thus happen in full view of the houses on the adjoining hills of the plantation owned by white citizens and being along or near the public road to Natchez from the white owned plantation, in plain sight for all to see who passed that way, yet without protest for twenty, thirty, or forty years (even 75 years, in reality). The facts of life in Adams County, Mississippi and in Natchez, where

the Courts of said Adams County sit, most assuredly repel the very thought of the seizing and using of a sizeable acreage of good farm land by negroes, openly and notoriously, by crossing the sizeable stream and cultivating the land and using it as their own as against white landowners, even for one season, (or even one day) much less for many years, *unless* by reason of and in view of knowledge and consent of the adjoining white plantation owner that such occupancy is *right*, and by virtue of clear, unquestioned legal right. Finally, it could not possibly happen, even after discovery of oil on the premises in question, that the white plantation owners would refrain for another ten years in making claims to the premises if they thought it were their own. But, most incredible of all is the fact, as here, that not a *single one* of the white plantation owners (some 5 or more cotenants, as to the surface interest) or any of their mineral *grantees*, would come to court, or even offer to *testify* as to *any claim* to the lands in controversy.

But, the record here reflects that it actually happened in the case at bar that not a single adverse party testified for his own claim or against the claim of said negroes, the said Petitioners here. Beyond question there has been a "taking of property from one landowner and giving it to another", condemned by Judge Rodgers (*supra*) and by the Fourteenth Amendment to the Constitution of the United States.

Now, if this Supreme Court of the United States shall grant the Writ of Certorari in this cause and permit briefs to be filed, it will be made more certain that the exact property line location in question has been established by the defendants themselves, by their own introduction of General Exhibit III, which shows precisely and by designation the "C. W. Babbitt's 1885 Meanders", and which

shows precisely the acreage even to the *thousandth* part of an acre, of the lands to the west thereof as Tract "B" of 50.443 acres, and shows as to the oil lands in controversy in the producing Unit, colored in *yellow* on said plat introduced in evidence by defendants, some 16.123 acres as Tract V, 8.575 acres as Tract VI, 2.008 acres in the stream bed and .517 acres in Tract III A, for a total of some 27.226 acres in the oil land acreage, lying West of said C. W. Babbitt's 1885 meanders, which was the boundary. Actually the additional undisputed matter; this General Exhibit III, introduced by defendants in the trial court, shows with certainty the line in question. The exhibit was agreed upon by all parties.

In conclusion the dissenting opinion of Judge Inzer is quoted to the following extent:

> . . . From that time up until the time of the trial of this case, Robinson and his heirs had remained in open, notorious, exclusive and uninterrupted possession of the property under the claim of ownership. They exercised all rights of ownership on the property that it was capable of having exercised on it, including cultivating each year a portion of the land. During this entire period none of the owners of Berkley Plantation ever made any claim to this land. In fact, so far as the record shows, they never made any claim until after oil was discovered. This case is unusual in that none of the owners of Berkley testified in this case. There is no evidence that they ever asserted any claim to this land or that they even now claim to be owners of it. . . .

And in the words of dissenting Judge Rodgers there has here been

> . . . "the taking of property from one landowner and giving it to another. . . . "

If cases are to be determined *contrary* to the only pertinent, vital, undisputed, "controlling" evidence then due process of law and equal protection of the law is denied,

no matter what the race of the injured party. If any State Courts may thus decide cases, without any review, or right of review by the parties in the Supreme Court of the United States of America, then "property rights" will be subject to the whim of the judge or jury in any particular area and case, and the equal protection of the law, and due process of law as provided by the words of the Constitution of the United States, will become or be *dead letters* indeed.

This particular case, or some case of this nature, is of vital importance to all the people of the United States of America in that an expression of the Supreme Court of the United States is well nigh indispensable, and of great importance here to all said people, of all races, as a guide, warning an example of the necessity for equal protection and due process of law relative to property as well to life and liberty.

Finally it is urged that the dissenting opinions (of Appendix "C") hereto be given most careful consideration, and that this cause be reviewed by Writ of Certiorari so that protection of property under the Fourteenth Amendment to the Constitution of the United States, by preserving due process of law and the equal protection of the law, may not fail but may be maintained in Adams County, Mississippi, as elsewhere.

Respectfully submitted,

W. E. Morse
Bankers Trust Plaza Building
Jackson, Mississippi
An Attorney for Petitioners

Morse & Morse
Bankers Trust Plaza Building
Jackson, Mississippi
Of Counsel

CERTIFICATE OF SERVICE

I, W. E. Morse, one of the attorneys for Petitioners herein and a member of the Bar of the Supreme Court of the United States hereby certify that I have this day served printed copies of the foregoing Petition for a Writ of Certiorari on the Respondents in the manner following:

By depositing a copy thereof in the United States Post Office at Jackson, Mississippi, with first class postage prepaid addressed to counsel of record at their respective post office addresses, listed as follows:

1. Messrs. Gwin & Gwin
   Attorneys at Law
   Lomond Building
   Natchez, Mississippi

2. Laub, Adams, Forman & Truly
   Attorneys at Law
   City Bank & Trust Co. Bldg.
   Natchez, Mississippi

3. Eaton, Cottrell and Lang
   Attorneys at Law
   Holcomb & Milner Building
   Gulfport, Mississippi

4. Watkins, Pyle, Edward and Ludlam
   Attorneys at Law
   Deposit Guaranty Bank Building
   Jackson, Mississippi

5. Brandon, Brandon, Hornsby & Handy
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   Natchez, Mississippi

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7. Hon. Joe A. Thompson
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8. Hon. M. M. Roberts
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9. Hon. Robert G. Gillespie, Jr.
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Attorneys at Law
Lamar Life Building
Jackson, Mississippi

10. Teller, Biedenharn & Rogers
Attorneys at Law
Vicksburg, Mississippi

11. Mr. Charles Perrault (counsel pro se)
P. O. Box 223
Natchez, Mississippi

I further certify that I have caused to be mailed, postage prepaid, forty (40) printed copies thereof to the Clerk, United States Supreme Court, Washington, D. C. 20530

This the ..... day of January, 1966.

W. E. Morse
Bankers Trust Plaza Building
Jackson, Mississippi
One of Counsel for Petitioners

APPENDIX "A"

JOHN ROBINSON et al.,
Appellants,

v.

HUMBLE OIL & REFINING COMPANY et al.,
Appellees.

No. 43476.

Supreme Court of Mississippi.

June 14, 1965.

PATTERSON, Justice.

This suit involves title to approximately 83 acres of land, and certain oil royalty payments therefrom, in Adams County lying between the present bed of Second Creek, a sizeable stream, and the old bed of the stream as it was alleged to have been located in 1885. The basic issue to be determined is the location of the eastern boundary of the complainants' land and the western boundary of the defendants' land, the same being contiguous.

The complainants and cross defendants, John and Frank Robinson, Jr., are brothers who own without dispute the land west of Second Creek, but who claim, by this suit, that their eastern boundary is east thereof to the old bed of Second Creek as it is charged to have been located in 1885. J. L. Tillery, complainant and cross defendant, is a grantee of an undivided mineral interest from the Robinson brothers. The defendants and cross complainants own without dispute Berkley Plantation to the east of Second Creek as it was alleged to have been located in 1885,

but presently defend and claim by cross-bill that their western boundary extends to Second Creek at its present location. There are more than 100 defendants and cross complainants who claim their respective interests through the owners of Berkley Plantation. Hereinafter the complainants and cross defendants will be referred to as Robinson and the defendants and cross complainants as Berkley.

Humble Oil & Refining Company is the lessee of oil, gas and mineral leases from the property owners on both sides of Second Creek. Their interest in the suit is that of a stake holder as to the suspended royalty payments during the pendency of this suit. Their lease interests are not in controversy in this suit.

After a hearing, the court entered a decree finding the thread of Second Creek as it is presently located to be the western boundary of Berkley Plantation and the eastern boundary of the Robinson lands. The bill of complaint therefore was dismissed and the cross-bill sustained confirming title in the owners of Berkley and their grantees. From this decree complainants appeal, designating as their principal assignments of error the following:

(1) The court erred as the decree rendered is against the overwhelming weight of the evidence.

(2) The court erred in excluding the testimony of John Robinson as to matters prior to the death of his parents.

(3) The court erred in sustaining objection to the testimony of possession as against the remaindermen claiming under the will of Anna F. C. Martin.

(4) The court erred in adjudging the cross complainants to be the owners of the land and royalties in dispute.

(5) The court erred because the decree rendered herein deprives the complainants, appellants, of their property

without due process of law, and deprives them of substantive rights without due process of law, contrary to article 3, section 14 of the Constitution of the State of Mississippi and contrary to amendment XIV of the Constitution of the United States of America.

These assignments necessitate a review of the parties' contentions as well as the evidence.

Robinson contends that the movement of Second Creek westward from the 1885 line was by an avulsion and that his eastern boundary remained at the former bed of the stream rather than moving westward with the stream by avulsion. Robinson contends further, if in error in the foregoing, that in any event he has held to the bed of the stream as it was in 1885, and under color of title, and that he has obtained title thereto by adverse possession.

Robinson's chain of title begins with a partition suit in 1885 which awarded to Amanda Hargraves Lot No. 5 which was described as:

> Begin at (6) on the map and the S.W. corner of No. 3 on Est. boundary of No. 4, thence south 24 chs. (8) on the map stake whence Pine Oak X// 30" dia. S. 13½ E. 28½ feet and a Pin Oak X// N. 45 W. 11½ feet. Thence N. Thence along the road S. 1 degree E. 6.00 chs. to (15) on the map made corner on forket Oak X// on top of a high bank on East side. *Thence N. 89½ E. about 58 chs. to Second Creek (17) on the map, a stake whence a sycamore "No. 8 X B.T." bears S. 4 degrees W. 26½ feet, thence up the creek to S.E. corner of Lot No. 3 S. 89½ W. 86 chains to the beging* (sic), containing 280 acres (Emphasis added.)

Mary E. Ligon obtained Lot No. 3 in this same partition suit which was described as follows:

> Begin at S. West corner of Lot No. 2 previously mentioned. Thence with Buckhurst line S. 2 degrees

W. eleven chains to a small walnut X// for a corner on the West side of an old road. Thence with the line of Lot No. 3 and No. 4 N. 89½ E. 35.00 chains to a Hackberry X// for a corner whence a gum 30 in. X// N. 60 W. 0.36 lks. (5) on the map. Thence between No. 3 and No. 4 South 21 chs. to (6) on the map a post whence a Pine X// S. 9 degrees E. 107 lks and cluster of Oaks X// S. 6¼ W. 118 lks, *thence between Nos. 3 and No. 5 N. 89½ E. 86 chs. to Second Creek below the mouth of a Bayou whence a cotton Wood X// South 3½ feet (18) on the map. Thence up the creek to the S.E. corner of No. 2 previously mentioned,* thence with No. 2 and around the Home lot to the beginning, containing 270 acres. (Emphasis added.)

Thereafter Amanda Hargraves conveyed to Melissa Mazique Lot 5 on December 1, 1886, by deed which described the land conveyed as:

Lot No. 5, as designated on the Map accompanying the report of Special Commissioners appointed by the Chancery Court of Adams County, Miss., in partition suit on the General Docket of the Court, and containing 280 acres, more or less, and being the same lot allotted to Amanda Hargraves in said cause No. 873 and conveyed to Melissa Mazique by deed in Book AAA Page 439.

About this time Mary Ligon conveyed approximately 13 acres of Lot 3 of said partition to Cavanaugh Mazique. Thereafter Melissa and Cavanaugh Mazique gave a deed of trust to the National Bank of Commerce wherein A. H. Geisenberger was named as trustee. This deed of trust was foreclosed by the trustee and a trustee's deed was executed to Adolph Jacobs on September 2, 1911, which described the property as follows:

Lot No. 5 as designated on map accompanying the report of the Special Commissioner appointed by

Chancery Court of Adams County, Miss., in the partition suit numbered No. 873 on the general docket of said court; said lot No. 5 containing 280 acres, more or less, and being the same lot allotted to Amanda Hargrave in said cause No. 873 and afterwards conveyed to Melissa *Mazycque* by deed recorded in deed book 3-A, Page 439; the commissioners report being recorded in Deed Book ZZ, Page 580.

That certain 13 acre tract bounded on the South boundary of Lot No. 3, as shown by the commissioners report in said cause No. 873; the East bank of Meadville and Natchez Public road and the bank of Second Creek, which said thirteen acre tract was conveyed to Cavanaugh *Mazycque* by Mary E. Ligon by deed recorded in Book 3-A, Page 306; save and except two acres of said tract which were conveyed by Cavanaugh *Mazycque* to Harvey Ransom by deed recorded by deed recorded (sic) in Book 3-T, page 188.

Shortly thereafter Jacobs conveyed the property to J. B. Banks by substantially the same description as in the trustee's deed. Banks died, leaving the property to his widow who thereafter conveyed by deed of May 2, 1936, to Frank and Alberta Robinson Lot No. 5 and 13 acres off of Lot No. 3 by substantially the same description as used in the trustee's deed to Jacobs which is hereinabove set out in detail.[1] Frank Robinson died intestate on December 3, 1941, leaving as his heirs Alberta Robinson, his widow, and John and Frank Robinson, Jr., his sons, who inherited from him his one-half interest in the land. Alberta died intestate October 11, 1958, leaving as

1. The changes in the last deed are only to the extent that the paragraphs are designated by number, and a reference to the trustee's deed to Jacobs is incorporated within the Jacobs to Banks deed.

her sole heirs the two sons, complainants herein who inherited from her the remaining interest in the land.[2]

Berkley contends the center of Second Creek as it now exists to be the western boundary of the plantation and it denies complainants' theory of avulsion and adverse possession.

The chain of title of Berkley Plantation is admitted as is the description thereof, the calls of the deeds not being necessary except the following, which describes the western boundary thereof:

> On the west by Second Creek; and containing 1350 acres being the same land as set forth in that certain deed from Stanley Carter Schuler to Myra Blake Schuler dated March 29, 1938 and recorded in Deed Book 4-W at page 225 of the Deed Records of Adams County, Mississippi.

The deeds in the chain of title of Robinson indicate the eastern boundary of this land to be Second Creek and it is so alleged in the bill of complaint. The deeds in the chain of title of Berkley Plantation, though limiting the acreage thereof to 1350 acres, designate its western boundary as being the same Second Creek.

Since 1885 there have been changes in the location of the creek and its present location is to the west of the 1885 location. This westward migration of the creek and the discovery of oil on the lands in question precipitated this lawsuit. The two principal questions for determination are:

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2. There are numerous deeds of trust, a tax sale, a quitclaim deed and numerous mineral leases and assignments, royalty transfers, pooling agreements, etc. too burdensome to be set out in full, which have varied descriptions. The conveyances abovementioned and the descriptions therein are the paramount conveyances concerning this suit.

(1) Did the location of the creek change suddenly by a natural avulsion or by an avulsion aided or caused by drainage work and digging to direct the creek in a new channel, or an avulsion from either cause or both so that by law the boundary of the properties remained at its location prior to the avulsion or avulsions?

(2) Or, in the alternative, in the absence of proof of avulsion did the western boundary of Berkley follow the western movement of the stream by accretions to the east bank thereof or did Robinson hold to the old bed of the stream as it existed in 1885 by adverse possession for the statutory time regardless of the western movement of the live stream?

In support of their allegations as to there being an avulsion and as to adverse possession the complainant introduced the following witnesses whose testimony is summarized following their identity.

The first witness, Mr. W. L. Ball, owns 200 acres of land immediately north of the Robinson property which he acquired in 1938. This witness testified that he had no knowledge as to whether any of the Robinson land extended east of Second Creek, but that the land of Claire Mazique, which was just north of his property, and on which he measured cotton in 1933, extended east of Second Creek. He recalled when the Robinsons moved to their land in 1936 and stated that one of the tenants of the Robinsons was Dave Ely.

Mr. Charles H. Perrault, Jr., a defendant, was called as an adverse witness, but was realigned by the court as a complainant when it was discovered that his interests were identical to that of the Robinsons. His testimony was largely to the effect that he saw crops growing on the land in question, and that there were two fences on the

property. He did not know to whom the crops belonged nor could he with certainty give the location of the fences.

John Robinson, one of the complainants, was next called and testified that his father died December 3, 1941, and that his mother died October 10, 1958. An objection was sustained to the witness's testifying as to any matters preceding the death of his mother on the theory that it would establish a defense to the cross-bill filed by the defendants in violation of Mississippi Code Annotated section 1690 (1956). He testified that since 1958 he had farmed, cut timber, and maintained a fence "over there." He testified further that no one had adversely claimed the land since 1958 until the cross-bill was filed in this suit, and that the east boundary of his property was the bed of the old creek which was fenced on each side. He described the old creek as being "just as mother nature has left a bed there." He testified that in 1962 he cut $844.58 worth of pulpwood from this land.

The next witness, the wife of John Robinson, testified that she had knowledge of the property since 1951 when she moved there with her husband. Her testimony was that the property east of Second Creek was farmed by her husband and that the old creek bed was the eastern boundary line, and that to her knowledge no one had interfered with their possession of it since 1951. An objection was interposed to all of this testimony on the ground that some of the defendants were remaindermen and that the possession of the complainants after 1942 would not cause the statute of limitations to run against them. The court reserved its ruling on this point.

The next witness was Edgar Rounds, a colored man, who was familiar with the property since 1884. He testified that he had lived there nearly all of his life; that as a boy he played on the creek, swam, caught fish and

turtles there. He knew the property when Cavanaugh Mazique owned it and when Jim Mazique, Cavanaugh's brother, lived on the property and farmed it. He stated that there was a sudden change in the creek many years ago and, in his words, "When that flood water come, that throwed a good part of Mr. Blake's land, Berkley, on the west side of the creek and on down the creek further it throwed a good part of Robinson's land on the east side of the creek," and that Cavanaugh Mazique[3] continued to farm the land which had been thrown across the creek to the east. He identified this sudden change as having occurred prior to a cyclone or storm in 1906 or 1907 which remained vivid in his mind. His testimony was to the further effect that the old creek ran right to the edge of Berkley Hill and that you could presently see where the old creek was, and that when Cavanaugh Mazique owned the property, it was fenced on the west side of the creek by Cavanaugh and on the east side by the owners of Berkley; that the fences ran up and down the creek. He identified Clitus Michael and Alex Fitzgerald as being two tenants on Robinson's place, but he could not be specific as to the time. He also testified that he bought hay from the Robinsons from across the creek in about 1938 and that the land had "laid out" for about 15 years prior thereto.

George Jones testified that he was born in 1881 and that he had known the property for many, many years. He testified that the creek made a sudden change and that Cavanaugh Mazique went across the creek and farmed it; that a man by the name of Sylvester "took a plow and ran some furrows" and that the creek changed and went straight down. On cross-examination this witness identified the property he was talking about as being the Ligon-

3. One of complainants' predecessors in title.

Mazique property which was north of the Robinson property here in question.

The next witness was Forea Mazique, Jr., who has lived on the Robinson property for the past 27 years and is familiar with it though he only farmed it in 1957 and 1958. He testified that he operates a small store near the property and has furnished tenants who have farmed the area across the creek every year since he has been on the place. He states that the bank of the old creek was against the hills on Berkley's side and that Berkley's west line was the old creek. He further testified that each year as far back as he could remember Berkley Plantation had been cultivated and pastured by its owners. He stated that the creek bed had been located as it is now since he could recall, but that it caved some to the west due to the washing each year when they had floods.

Horace Fitzgerald was next called and testified that he was familiar with the property since 1938 and that he worked on the Robinson land from 1940 until about 1949 and that he moved on the property in 1949 and lived there until 1959. He testified that the Robinson property ran eastward to the old creek bed and that he and other tenants raised corn, hay, and gathered pecans "over there across the creek." On cross-examination he testified that the land he worked "over there" was approximately six acres in the middle of the island and that this same patch was worked by Dave Ely, Forea Mazique, and others; that there were not over six or seven acres farmed on the island. He also recalled that the timber was cut in 1947 or 1948 and was hauled off on the Berkley side. He testified further that Berkley Plantation was cultivated and pastured each year.

Forea Mazique testified that the old bed of the creek was right at the foot of the hill at Berkley. He identi-

fied Horace Fitzgerald, Clitus Michael, and Alex Fitzgerald as tenants who worked for Robinson at various times on his land. He testified that the Robinsons and their tenants worked some of the land on the east side of the creek. This witness also testified that a man by the name of Sylvester Lyles dug some furrows that caused the creek to make a sudden change when it overflowed, but he did not identify this occurrence as to time.

August Mazique was then called and testified as to the dividing line between the properties in question. "The old dividing line come right down the hill and right under that it turned to the left and used to be fenced in on each side. After that cave got in there, there was no fence on the west side at all." He further testified that there were old wires in the trees on the west side of the old creek and that the Berkley fence is kept up on the east side as it was in old days. He further testified that there was a sudden change in the creek, but he did not know when except to say that it was during the time when his father, Cavanaugh Mazique, owned the property. On cross-examination he testified that the big floods caused the creek to cave on the west side and that this caving is still going on at places.

John B. Robinson, a party to the suit, was recalled as the next witness. He introduced an aerial photo of the area dated April 1952 which was made by the United States Department of Agriculture, and which, according to the witness, shows all of the land that is here in dispute. The witness testified that from the date of his father's death in 1941 (the court sustained an objection to testimony prior to that time) to the present there was very little variance in that which was depicted on the 1952 aerial photo and the conditions as they existed in 1941, that is, the same cultivated areas, woodlands, etc. were

shown on the 1952 map as prior thereto. The witness further testified that to his knowledge no one had cut the timber on the land except himself. He then named the tenants who had been on his place, Alex Fitzgerald from 1942 to 1946; Minor Coleman, 1946 to 1949; Dave Ely, 1953 to 1956; Forea Mazique, 1956 to 1958; Horace Fitzgerald, 1957 to 1959; James Washington, 1949.

As opposed to this testimony, the defendants and cross complainants introduced the following witnesses:

Loretta Williams, approximately 71 years of age, who had lived on Berkley Plantation all of her life except about 5 or 6 years, and who testified that her father, Ike Jones, cleared or cleaned up the bottom land back of his house to the creek, and that her uncle and grandfather also worked in the bottom, farmed in this same area, and they farmed west to Second Creek, and that what is now Robinson's place is over cross the creek; that her father, her uncle, and her grandfather were all tenants of Berkley, and that after her father left, other tenants lived in the same house and farmed the same bottom land. This witness further testified that "Old Man" Jim Mazique farmed the land over there at one time, but that his cultivation did not go up to the foothills of Berkley Plantation; that the creek divided the two and that she had hoed cotton and corn for the Maziques prior to her marriage in 1916 across the creek and that she had never seen an old creek bed in there.

The next witness, Mr. R. D. Foster, an employee of the Natchez Hardwood Company, testified that his company cut the timber on Berkley Plantation beginning in 1947 and continuing for 2 or 3 years; that they cut all over Berkley Plantation to the western portion thereof which was Second Creek and that they cut without interruption from anyone; that he cruised the timber prior to its

being cut and that during the cutting he was out there two times a month to supervise the cutting and removal of the timber and that since this litigation started he has been back to the area; that in the years mentioned they cut timber on the land that is now in question. He further testified on cross-examination that he did not see any evidence of row crops at the time of the cutting; that most of area was in woodland with perhaps a little farming ground there, and he saw no evidence of an old creek bed there.

The next witness was Johnny Lishman, a logging contractor, who testified that he worked as a logger in 1947 as an employee of his father who was a logging contractor, and that they cut over Berkley Plantation over to Second Creek, that is, the flowing stream, and that he again logged this area in 1953 and that they again cut to Second Creek, the flowing stream; that during this cutting operation, which extended over a period of from four to six months, they used all types of logging equipment, caterpillars, trucks and loaders; that there was nothing secretive about it, and that their cutting operation was not objected to by anyone. On cross-examination this witness could not recall any cultivation being in the area east of the creek.

The next witness was Curtis R. Huff, Jr., a consultant forester, who surveyed the area in question with two assignments in mind, the first to estimate the age of the oldest timber situated on that area immediately west of the bluff and east of Second Creek and to make a similar sample of the age of the oldest timber immediately east of drilling unit No. 7. The second assignment was to estimate the species, the amount and value of the timber which had been removed through harvesting the last year. The witness testified that he made his beginning

point near the mid-point of the survey line made by Montgomery in 1951 and that from this area he moved in a southwesterly direction for a distance of about 250 feet where he found timber, primarily elm and locust, with an age of from 61 to 82 years, and that continuing in a southwesterly direction he found pecan, elm, oak, with estimated ages of 41 to 60 years, and that as he continued in this direction he found timber varying in age from 1 to 2 years along Second Creek up to 40 years of age. This witness further testified as to the topography of the land; that between the foot of the bluff and Second Creek there is a flat or flood plain or extreme bottom land; that the land near the bluff was higher than that next to the creek. He further testified that the species of trees follow a general pattern according to the species of the soil; that within the alluvial deposit the usual succession begins with the pioneer species, willow or cottonwood, and that as the soil grows to maturity it is succeeded by elm, pecan and sycamore, and that this occurs after the soil becomes firmer and a little more sediment or more organic matter is deposited in the upper portion, and as the soil ages, other types of trees such as oak, cherry, ash and sweet gum follow in succession. He further testified that in the area between the bluff and Second Creek there were two distinct ages of soil, the youngest or first being nearest to Second Creek which has a very high sand content with not too much firmness or top soil. He first designated this soil as being very young or new soil; he said that as you go toward the bluff from the creek there is more mature soil which is now supporting elm and pecan trees, and this soil appears to be older; it has more maturity than that near the creek. This witness found no indication of an old creek bed, but testified that there was an old drain at the foot of the bluff which drains the hills to the east of the area in question. His examination of the stumps revealed

them to be of recent cutting. (Evidently this refers to the cutting that was made by Mr. Robinson in 1962.) On cross-examination this witness testified that he did see some evidence of cultivation in the area; that he did not know how much was in cultivation, and refused to testify as to that. He was positive the soil between the depression at the foot of the bluff and the stream was that which was deposited by a stream. It was not a parent soil.

Austin B. Smith, a civil engineer, with many years of experience in his profession and who is presently employed as an engineer by the Mississippi River Commission, and who has had much experience with channel and cutoff problems on the Mississippi, the Arkansas, Red River and numerous tributary streams, testified next for the defendants. He testified that he had been employed to make an examination of the Second Creek area that is in dispute and make an engineering stream study of the stream's action and determine to the best of his ability how the lands in question were formed and to prepare a report setting forth his findings and conclusions as to this question. The heart of the problem presented was to determine the genesis of the lands in question. This witness made an extensive investigation of the area and background material which included the official records, the deeds, topographical maps, aerial surveys, and soil borings. From this background information this witness introduced numerous maps and other data compiled by him which indicate that since 1886, according to his testimony, the stream has meandered in a band of about 600 feet and that in some points it is almost identical today to its location in 1885. He further testified that there was no cutoff by the stream in the area and he found no evidence of an avulsion of the stream. He was equally positive that there was no old creek bed in the area, but that there was an old drain adjacent to the hills of Berkley to the east. He concurred in the testi-

mony of Huff, the forester, as to the makeup of the land between the present location of Second Creek and the foot of the hill at Berkley which, according to his statements, was that the younger soils were to the west, and became progressively older as they approached Berkley and this was borne out by the specie and age of the timber growths thereon. His conclusion was that the lands in dispute were formed as accretions to Berkley Plantation riparian lands; that this fact is documented by the meandered data, accretion information, bank line of maximum recession data, channel trace data, positive proof that no "cutoff" appeared between 1886 and 1963 in the sector of the channel between points G and H on his exhibits 9, 11 and 13, and on-the-ground information, and finally on timber and soil data.

On extensive cross-examination, the witness reaffirmed that his exhibit No. 13, which is an overlay to his exhibit No. 11, was "very near" correct from a reconstruction of the descriptions in the old deeds which were used in conjunction with the other background data, particularly the aerial photographs.

E. T. Jeffreys, a consulting geological engineer, offered as a rebuttal witness, testified that he had made an extensive examination of the property, which included a physical reconnaissance, taking core holes or borings to examine the soil and the geological formations present, by flying over the area in an airplane to obtain a bird's eye view of it, and by examining the various aerial photographs, the deeds and the records that were introduced or referred to by the foregoing engineering witness. The witness testified that on his first day in the area that he took core holes from what appeared to be the old bed of Second Creek at the foothill of the escarpment or bluff on the east side, and found underneath the top soil in this depression a layer

of gray silt, which the witness believed was deposited by Second Creek at the time it followed that course. He further testified that this gray silt was found only in this depression and that it was not present in the part that was cultivated, or beyond the hill, nor was it found even two or three feet out of the depression which appeared to have been the old river bed. He further testified that there was an avulsion of the creek around 1900, and that this was positively proven by the growth of timber which lay between the old creek bed and the present creek; that the creek had to avulse or it would have killed these trees if it had meandered across to its present position. He introduced his exhibit J-5 which indicates by a blue line the creek as the witness believed it to have been located in 1885 and 1886, which is considerably east of some of the trees which were depicted on the map of the forester. He further testified that he located a honey locust tree of great size and age in close proximity to other trees depicted on the map of the forester, but that this tree was not shown on the map. According to his testimony this tree is west of the old creek as he locates it, and from this he was positive that there was no accretion westward as it would have killed this tree. He testified further as to the avulsion of the stream; that Second Creek had been rejuvenated by virtue of engineering work on Homochitto River below, which increased the flow of the stream thereby causing cutoffs and avulsions. These were set out on his exhibit J-6. He testified that he was able to locate with reasonable accuracy, from the aerial survey and the data given on the plats in evidence as exhibits, the southeast corner of Lot No. 3 and that by reconstruction of the 1885 survey he was able to establish the approximate location of old Second Creek. According to his testimony, this reconstruction was accurate in that the old bank of the creek,

to which Babbit made his survey in 1885, is easily discernible on the ground.[4]

John Robinson and Horace Fitzgerald were recalled in rebuttal, denied that either Foster or Lishman had cut timber on the land across the creek.

At the conclusion of the testimony the court, in compliance with a motion of the complainants, inspected the premises prior to rendering its decree, which was adverse to the complainants.

[1] We are of the opinion that the first assignment of error, that the decree rendered is against the overwhelming weight of the evidence, is not well taken, both to the complainants' theory of avulsion and adverse possession. The law is well established that when a stream is the boundary between properties, this boundary shifts with the gradual vagaries and changes in the stream, but that if there is a sudden or avulsive change in its course, the boundary remains fixed to the location of the stream prior to the avulsion. See Anderson-Tully Co. v. Tingle, 166 F.2d 224, cert. den. 335 U.S. 816, 59 S.Ct. 36, 93 L.Ed. 371 (5th Cir. 1948) wherein this rule is announced as follows:

> The law of Mississippi as to boundaries by freshwater streams above the ebb and flow of the tides is the common law, regardless of the size and actual navigability of the streams; and that law is that the owners of the land own to the thread of the current of the stream, assumed in the absence of other proof to be the center line of the stream; but that the boundary shifts with gradual nonavulsive changes in the stream, so that an owner may lose or gain an indefinite area thereby.

4. The reconstructed surveys and other exhibits of Jeffreys and Smith vary to a great degree.

[2] The inquiry, there being no dispute as to the law on this point, reduced itself to a determination of the facts by the trial court, and this limitation narrows the scope of this Court's review to the ascertainment of whether there was credible evidence to support the findings of the chancellor since we abide by the oft-cited law to the effect that the chancellor as the trier of fact should not be reversed unless it appears that he was manifestly wrong. Ellis v. Ellis, 248 Miss. 483, 160 So.2d 904 (1964); Hastings v. California Co., 241 Miss. 160, 129 So.2d 379 (1961); Smith v. Van Norman, 234 Miss. 526, 106 So.2d 897 (1958); and Osborn v. Thomas, 221 Miss. 682, 74 So.2d 757 (1954). The evidence was in sharp conflict as to whether there was an avulsion of the creek. Two of the complainants' witnesses, who had known the stream for many years, testified that there was a sudden change in its course, as did the geological expert, Jeffreys. However, the testimony of the forester and the engineer, both experts in their respective fields, and who examined the area in detail, was precisely to the contrary. The argument of the complainants that the presence of the old honey locust tree between the old creek bed, as established by Jeffrey's exhibit No. 5, and the present Second Creek is very persuasive and would be decisive of the avulsion theory if it were not refuted by the exhibits of the engineer, which placed the meander of Second Creek to the west of this particular tree. The chancellor could with logic accept or reject either of these exhibits as being correct.

[3, 4] In addition to hearing the evidence, the chancellor viewed the premises in question and determined that there was no sudden change or avulsion of the creek. We hold there was substantial evidence to support this conclusion and certainly we cannot state that he was manifestly wrong in this regard, and particularly so in view

of United States Gypsum Co. v. Reynolds, 196 Miss. 644 at 659, 18 So.2d 448 at 449 (1944) that:

> In the absence of countervailing evidence, the presumption of gradual erosion and accretion prevails when the lay of the land, the length of the elapsed time as related to the distances of the movement, and the general correspondence of the location and directions of the river at the later period as compared with that of the earlier, are such that the stated presumption may be reasonably entertained. * * *

[5] The complainants contend, however, under this assignment, that title to the lands west of the hill at Berkley and east of the present flowing stream was vested in the complainants by adverse possession under color of title in excess of the statutory period of 10 years. The evidence reflects, with two exceptions, that the complainants and their predecessors in title have used the area in dispute for many years in excess of the statutory period by cultivating six or seven acres across the creek, the perimeter of the lands cultivated not being described, by cutting hay therefrom, by gathering firewood, by selling timber, and by gathering pecans therefrom, the only exceptions we find to this continuity of possession being the cutting and removal of timber from this area in 1947 and in 1953. In view of these facts the complainants insist their use and occupancy of a portion of the area extended their possession to the boundaries as set forth in their 1936 deed of acquisition. The calls of that deed are substantially the same as were used in deeds from 1885 to 1936 wherein these deeds specify the eastern boundary to be the creek as described by reference to the partition suit of 1885 and the various deeds given in accordance therewith. The rule of possession, under color of title, of a portion of a tract of land extending such possession to the limits of the deed is plausible and is well-established in

our jurisprudence. See Page v. O'Neal, 207 Miss. 350, 42 So.2d 391 (1949); Bullock v. Greer, 181 Miss. 190, 179 So. 264 (1938); and Evans v. Shows, 180 Miss. 518, 177 So. 786 (1938). However, this theory of law applies with equal weight to the defendants who, without dispute, continuously possessed, used and occupied Berkley Plantation down through the years far in excess of the statutory period, and their possession would also extend to the boundaries established by the calls of their deed, the western boundary of which was the center of Second Creek. The proprietors of Berkley were riparian owners with a vested right to the accretion to their property, and, we might add, the vested hazard of loss by erosion. Their possession of Berkley remained constant with its boundaries, one of which was the thread of Second Creek, and as the creek migrated or changed, so did the boundary, the two being coextensive. See Anderson-Tully Co. v. Tingle, 166 F.2d 224, cert. den. 335 U.S. 816, 69 S.Ct. 36, 93 L.Ed. 371 (5th Cir. 1948) supra; Philadelphia Co. v. Stimson, 223 U.S. 605, 32 S.Ct. 340, 56 L.Ed. 570 (1912); and St. Clair County v. Lovingston, 23 Wall. 46, 23 L.Ed. 59 (1874). See also Sharp v. Learned, 195 Miss. 201, 14 So.2d 218 (1943), and Wineman v. Withers, 143 Miss. 537, 108 So. 708 (1926), our own decisions to the same effect. The record reflects that a portion of the questioned area was cultivated and used by the Robinsons each year which, as above stated, gives them constructive possession to the area within the calls of their deed. It also reflects that Berkley was cultivated each year which would also give to it constructive possession of the area within the calls of its deed. Assuming, but not deciding, that the position of complainants in asserting that the eastern boundary of their property became stabilized by reference to the partition suit of 1885 and was therefore not subject to subsequent lateral fluctuations of the stream,

and there are authorities to the contrary.[5] This assumption begets only overlapping possession which aids neither party. See Lawrence v. Byrnes, 188 Miss. 127, 193 So. 622 (1940) wherein it states:

> Each side attempted to show adverse possession by actual occupancy of the triangular tract, but in this both sides failed. But appellants argue that inasmuch as they have been in the actual adverse possession for more than ten years of that part of Lot 3 of Share 1, the plat and description of which was made of record by the decree in partition in 1901, which lies sought of the channel, as it then existed, and where it has continued to exist without change since that time, their adverse possession extends by construction to the involved triangular tract across the stream which was by the plat and decree aforesaid shown as a part of said Lot 3 of Share 1. The difficulty in the path of appellants in respect to this contention is that appellee was, and has been, throughout the same period in the actual occupancy and possession of a large and substantial part of Section 14 under a recorded deed to him as the owner of the entire section so that his constructive possession would extend to all of the section, wherefore we would simply have a case of overlapping constructive possession, which, of course, does not aid either party as against the other. (188 Miss. at 135, 193 So. at 623.)

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5. See Jefferis v. East Omaha Land Co., 135 U.S. 178, 10 S.Ct. 518, 33 L.Ed. 872 (1890):

> * * * it justifies the view announced by the circuit court in its opinion, that where a water-line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary, and a deed describing the lot by number or name conveys the land up to such shifting line exactly as it does up to a fixed side line. * * *

These views result in the conclusion that the side lines of lot 4 are to be extended to the river, not as the river ran at the time of the survey in 1851, but as it ran at the date of the patent in 1855, and that all the land which existed at the latter date, between the side lines so extended and between the line of the lot on the south and the river on the north, was conveyed by the patent.

The description of the western portion of Berkley Plantation was definite in that it extended to the center of the stream. By contrast the description of the eastern portion of complainants' land, as urged upon us by the complainants, is indefinite and uncertain inasmuch as no one has definitely established the location of Second Creek as it existed in 1885. The constructive possession within the calls of complainants' deed is therefore vague and indefinite and as such is not subject to definite decision. We hold, therefore, that the trial court committed no error in finding that the complainants failed to prove title in themselves by adverse possession and in confirming Berkley's title to the present thread of Second Creek.

[6-8] We are of the opinion that the lower court erred in holding inadmissible evidence relating to events prior to the death of complainants' father and mother as the same was introduced not to defeat the rights of the estates, but was rather in behalf of the estates. Ford v. Byrd, 183 Miss. 846, 184 So. 443 (1938); Cock v. Abernathy, 77 Miss. 872, 28 So. 18 (1900); and Sweatman v. Parker, 49 Miss. 19 (1873). We are of the further opinion the court erred in not admitting the introduction of evidence which might have been against the remaindermen under the will of Anna F. C. Martin since the statute having started to run before the death of the owner, it would not be abated by her death. See Leggett v. Norman, 192 Miss. 494, 6 So.2d 578 (1942). However, the complainants did not preserve these questions in the record so that we can consider their weight on appeal. See Manning v. Hammond, 234 Miss. 299, 106 So.2d 51 (1958) wherein this Court held:

> While we are of the opinion that the chancellor was in error in holding these witnesses to be incompetent and in excluding their testimony, we cannot consider such error because it does not appear in the record what was proposed to be proved by these witnesses,

> and we are, therefore, not in a position to say whether the offered testimony would be material and relevant or whether its exclusion constituted prejudicial error. (234 Miss. at 307, 106 So.2d at 55.)

We hold, therefore, these assignments of error are not well taken.

We are of the opinion the final assignment of error, that the decree of the lower court is violative of the Mississippi Constitution, as well as the United States Constitution, is not well taken as the record reflects the complainants were not deprived of any right and that they were accorded due process of law.

Affirmed.

All Justices concur except GILLESPIE, J., who took no part.

APPENDIX "B"

Judgment of Mississippi Supreme Court of

June 14, 1965

IN THE SUPREME COURT OF MISSISSIPPI
MONDAY, JUNE 14, 1965, Court Sitting
JOHN B. ROBINSON, ET AL

vs. No. 43,476

HUMBLE OIL & REFINING CO., ET AL

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court of Adams County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge and decree that the decree of said Chancery Court rendered in this cause on the 7th day of February, 1964-be and the same is hereby affirmed. It is further ordered and adjudged and decreed that the appellees do have and recover of and from the appellants and Insurance Company of North America, surety on the appeal bond herein, all of the costs of this appeal to be taxed, for which let proper process issue.

STATE OF MISSISSIPPI
HINDS COUNTY

I, Julia H. Kendrick, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the foregoing is a true and correct copy of judgment rendered by the Court in the cause therein stated, as the same appears of record on file in my office.

Given under my hand, with the seal of said Court affixed, at office, in the City of Jackson, Miss., this the 21st day of December A.D., 1965.

/s/ Julia H. Kendrick
Clerk Supreme Court.

(Seal)

APPENDIX "C"

JOHN B. ROBINSON et al.

v.

HUMBLE OIL & REFINING COMPANY et al.

No. 43476.

Supreme Court of Mississippi.

Oct. 11, 1965.

INZER, Justice:

A majority of my brethren are of the opinion that the suggestion of error in this case should be overruled. Therefore, it must and will be overruled.

However, I would sustain it for the reasons herein set out. It should be stated at the outset that there is very little if any disagreement among us as to the fundamental principles of law involved in this case. We are in disagreement as to some of the facts and the application of the law to the facts.

After a careful study of the record in this case I am of the opinion that we were in error in affirming this case. The chancellor was manifestly wrong when he found from the evidence that there had been no avulsion of Second Creek. Our opinion in this case recognized the fact that in order for Second Creek to have changed its location by accretion that its bed in 1885 must have been located somewhere west of the 100-year-old locust tree. All the evidence on this point reveals its location in 1885 to be east of the old locust tree, except the testimony of the witness Austin Smith. A careful study of Smith's testimony reveals that in order for him to place the bed of the stream west of the old locust tree in 1885 it was necessary for him not only to move the location of the creek

674 feet west of the point where Babbitt showed it to be located in 1885, but also to change the curve in the creek from an easterly direction as shown by Babbitt on his map to a westerly one. To allow him to do this is to allow him to discredit an ancient document. This is contrary to law and common sense. It is strange that neither Smith nor the witness Huff ever saw this locust tree prior to the time the witness Jeffreys revealed its location in his testimony in rebuttal on behalf of appellants. This tree was located near an oil well, and it should have been obvious to any person making an examination of the property in question. The testimony of Smith on this point is a clever and obvious attempt to bolster his testimony that there was no avulsion of Second Creek. I do not think that his testimony on this point is credible, and I am of the opinion it should have been disregarded by the chancellor and this Court. The fact that the chancellor viewed the premises after trial of this case is not sufficient reason to affirm his decision on this point because there was nothing on the ground that he could see that would reveal to him where the bed of Second Creek was in 1885.

I am also of the opinion the chancellor was manifestly wrong in holding that appellant had failed to prove adverse possession, and that we were in error in affirming such finding. This is true even though we concede that there was no avulsion of Second Creek. An examination of the partition decree rendered in 1885 reveals that the description used in describing the various lots set aside to the parties, including Lots 3 and 5 involved in this case, was a metes and bounds description with distances and monuments. Each call in the descriptions that reached the bank of Second Creek went a certain distance to a stake on the bank of the creek and each stake had a marked reference tree. This established definite monuments at

these points. It is true that the calls from the points thus established ran with the creek. However, we know from the oral testimony and from the aerial photographs in evidence in this case that if there was accretion involved that it occurred prior to 1936 when Robinson acquired title to his property by the same description that was used in the 1885 partition. After acquiring title Robinson went into possession of all property called for in his deed. Thus he was in possession under a deed which called for his land to extend to the points established by the partition decree of 1885. From that time up until the time of the trial of this case, Robinson and his heirs had remained in open, notorious, exclusive and uninterrupted possession of the property under the claim of ownership. They exercised all rights of ownership on the property that it was capable of having exercised on it, including cultivating each year a portion of the land. During this entire period none of the owners of Berkley Plantation ever made any claim to this land. In fact, so far as the record shows, they never made any claim until after oil was discovered. This case is unusual in that none of the owners of Berkley testified in this case. There is no evidence that they ever asserted any claim to this land or that they even now claim to be owners of it. The record reveals that their answer and cross bill was sworn to by one of their attorneys and not by any of the owners. The result of our decision has been to allow a fiction of law to prevail over actual adverse possession under color of title for a period of far longer than the statutory period of ten years.

It is clear from the evidence in this case that although it be conceded that there was no avulsion and no adverse possession under color of title, the decree of the chancellor affirming the title to all land in dispute in the appellees was error, and we were in error in affirming that part of the decree. This statement is based upon the fact that

the proof shows without question and without dispute that appellants have cultivated a portion of this land from 1936 to the date of the trial. Our opinion seems to indicate this was only about six acres. However, the documentary evidence shows it to be a much larger area. In fact, one of the exhibits properly in evidence reflects the area cultivated constitutes about 27 acres. We indicated in our opinion that although proof establishes appellants had acquired title to this area by adverse possession, that the chancellor was justified in finding they had failed to meet the burden of proof because of failure to definitely describe the land so it could be definitely located. We overlooked the fact that in the face of this proof that the chancellor had disregarded it in granting the relief prayed for in the cross bill. It is elemental that the burden of proof was upon the appellees to prove that they owned all the land in dispute, including the 27 acres, before the chancellor would be justified in cancelling appellants' claim to the land. This they failed to do, for the reason the proof shows appellants had acquired title to this portion of property by adverse possession. The fact that it was not definitely described by metes and bounds description does not give appellees title to the land. The aerial photographs clearly show where this property is located, and it would be no difficult task to have a surveyor locate and describe the land. Under the state of proof in this case the chancellor was not justified in cancelling the claim of appellants to that portion of the land that they had acquired title to by adverse possession.

For the reasons stated, I am of the opinion we should sustain the suggestion of error and reverse this case. However, if we do not go that far, we certainly should at very least sustain the suggestion of error in part so as to reverse that part of the decree that cancelled the claim

of appellants to the 27 acres that they have cultivated these many years under claim of ownership. In my opinion the decision in this case results in a miscarriage of justice and does not do equity.

Suggestion of error overruled, by LEE, C. J., and JONES, BRADY, PATTERSON and SMITH, JJ.

RODGERS and INZER, JJ., dissent.

ETHRIDGE, P. J., concurs in part and dissents in part.

GILLESPIE, J., took no part.

ETHRIDGE, Justice (concurring in part and dissenting in part):

I concur in most of the points decided in the controlling opinion previously rendered. 176 So.2d 307 (Miss. 1965). This dissent concerns only the relatively small tracts on the east side of Second Creek which have been adversely possessed by appellants for many years, as everyone agrees the record shows.

The chancery court was justified in finding that there was accretion to appellees' land, and the right to such accretions vested in them. Nor can appellants claim the benefit of the doctrine of color of title, since the location of Second Creek in 1885 was not established, and therefore the partition decree, which appellants assert constituted color of title, was inadequate for that purpose.

However, the evidence establishes, as the controlling opinion recognizes, that appellants and their predecessors in title have used and adversely possessed between six and twenty-seven acres across the creek for many years, by cultivating it, gathering firewood, and selling timber. Although the bill of complaint did not request expressly an adjudication of ownership of the land actually adversely possessed, the chancery court had the power and

the duty, under general allegations of the bill, to so find and decide. It should have done so, and in my view, the suggestion of error should be overruled in part and sustained in part, and the cause remanded for a limited purpose: To determine the boundaries of the land of which appellants have been in actual adverse possession for more than the statutory ten years.

This result would be in accord with the plain facts and would effectuate an equitable decision. It would be consistent with the duty of the chancery and this Court to "remand the case to the files," or to remand it to the trial court for determination of appropriate facts necessary to an equitable decision. See Williams v. Edwards, 246 Miss. 92, 149 So.2d 326 (1963); Griffith, Miss. Chancery Practice § 595 (2d ed. 1950). This is the aim of judicial administration. The non-existence of direct precedents on this point should not prevent the use of a reasonable method of effectuating justice. On the contrary, it indicates the need for such an appropriate procedure.

Appellants have shown actual, continuous, adverse possession of a small portion of the entire tract in litigation. It should be the duty of the chancery court, after hearing appropriate evidence, to identify that tract and to recognize appellants' title to it.

RODGERS, Justice (dissenting):

This case has been presented to the conference repeatedly and much study has been devoted to this very difficult statement of facts, nevertheless, I am convinced we have reached the wrong conclusion. I agree with the dissenting opinion of Judge Inzer for the following reasons: (1) Assuming there was an imperceptible movement of the creek from the east to the west and that such movement was a gradual accretion, rather than a sudden avulsion, the evidence, in my humble opinion, shows

otherwise, obviously such accretion occurred long before the parties purchased the land west of the creek. Their deed described definite points in the northwest and southwest corners of their lots, and was the same description previously given to this land in other deeds before the creek moved. This, in my judgment, establishes a claim by color of title to all of the lands described in their deeds, at the time they went into possession, without regard to where the creek was located at the time the deeds were made. They occupied and used twenty-seven acres of land east of the creek and therefore were entitled to all of the lands described within the calls of their deed because of their adverse claim to a part of the property thus occupied. (2) Again assuming that there was sufficient evidence to establish that there was an accretion by the creek from east to west after the parties became riparian proprietors of the land to the west, nevertheless, it is shown by overwhelming evidence that the owners of the land on the west used, occupied and claimed twenty-seven acres east of the creek and there can be no reasonable dispute as to the fact that they used and occupied this twenty-seven acres longer than was necessary to establish a claim by adverse possession to the land. But, said the landowner to the east, they did not claim adverse possession to twenty-seven acres, nor did they prove the description or area of land used east of the creek. The answer to that argument is obvious. The twenty-seven acres were shown by aerial photograph, from which actual metes and bounds description was easily obtainable. Moreover, the title was divested from the western riparian proprietors upon a cross bill filed by the eastern riparian proprietor, and the burden was upon the cross-complainants to show they obtained title by accretion—not avulsion—to all of the lands claimed to have been obtained by accretion. 56 Am.Jur. Waters § 487 (1947). The facts

show beyond question that the eastern landowner never had possession of the twenty-seven acres used by the western riparian proprietor.

In either case, we should have reversed the trial court. I am of the opinion that the western landowner was entitled to all of his land up to the eastern boundary as shown by the calls of the description in his deed. Failing in this argument, he was certainly entitled to the lands he adversely occupied for more than ten years.

I join in this dissent to hold up a flag to the trial courts, so that they as well as the appellate court may be reminded that the taking of property from one landowner and giving it to another, is not only fraught with danger of injustice, but the court should be very cautious in using a legal fiction as a tool to divest property owners of title to their land. I believe the Suggestion of Error should be sustained.

APPENDIX "D"

Judgment of Mississippi Supreme Court of October 11, 1965

IN THE SUPREME COURT OF MISSISSIPPI
MONDAY, OCTOBER 11, 1965, Court Sitting
JOHN B. ROBINSON, ET AL

vs. No. 43,476

HUMBLE OIL & REFINING CO., ET AL

This cause having been submitted at a former Term of this Court on the Suggestion of Error filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order and adjudge that said Suggestion of Error be and the same is hereby overruled.

STATE OF MISSISSIPPI
HINDS COUNTY

I, Julia H. Kendrick, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the foregoing is a true and correct copy of the judgment rendered by the Court in the cause therein stated, as the same appears of record on file in my office.

Given under my hand, with the seal of said Court affixed, at office, in the City of Jackson, Miss., this the 21st day of December A.D., 1965.

/s/ Julia H. Kendrick
(Seal) Clerk Supreme Court.

APPENDIX "E"

IN THE CHANCERY COURT OF ADAMS COUNTY, MISSISSIPPI

JOHN ROBINSON, ET AL.
vs.
HUMBLE OIL & REFINING COMPANY, ET ALS } No. 19,194

Final Decree

THIS CAUSE came on to be heard upon the pleadings filed herein, interim decrees heretofore entered, the testimony adduced at this hearing, argument of counsel, and a personal view by the Court of the area in controversy made at the request of the Complainants, and the Court having considered the same and being fully advised in the premises does hereby find as follows:

1. The middle or thread of the stream of Second Creek always has been the dividing line between the lands of the Complainants situated to the West of said Creek and

the lands of the Blake Estate and their successors in title to the East thereof, said land to the East being known as Berkley Plantation, sometimes also known as Berkely and Berkeley Plantation.

2. The changes in the bed of the Creek have been gradual and imperceptible and did not result from an avulsive change in the course of Second Creek, and the Court finds that no avulsive change in Second Creek has occurred in the reach flowing between the lands of Complainants and the lands known as Berkley Plantation.

3. The Complainants have wholly failed to prove any title in them to any part of the land lying East of Second Creek as the same presently exists and as said Creek flowed on the date that the Court took its view of the premises.

4. Complainants have wholly failed to sustain the allegations of their Bill of Complaint, including the claim of adverse possession, to any portion of the lands East of Second Creek as the same presently exists.

5. The exchange of deeds between certain of the parties Defendant as set out in the Answer and Cross-Bill of M. E. Ward, et al, was made voluntarily by the parties who executed the same for the purpose of settling and compromising the conflicting claim of title to the land described in said deeds of conveyance and the same should therefore be confirmed.

6. The Court finds that Charles H. Perrault, Jr., intended by the execution of the deeds executed by him, to join in such compromise and settlement of the conflicting claims of title to the interests in the lands specifically described in the deeds executed by him. The claim made in this Court by the said Charles H. Perrault, Jr. that he still retains a royalty interest East of the East boundary

line described in said deeds of exchange must however be denied since his claim of title is derived from a Grant executed by the Robinsons and their predecessors in title and since the Complainants' claim of title to any land East of Second Creek has been denied in this decree, any claim of title by Charles H. Perrault, Jr. to any minerals or royalty East of the East line of the lands described in said settlement deeds or to any monies now held in suspense by Humble Oil & Refining Company attributed to production from lands East of said East line must be and is hereby denied;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

(A) That the relief sought in the Bill of Complaint filed herein be and the same is hereby denied and the Bill of Complaint is dismissed.

(B) The middle or thread of the stream of Second Creek as it is now located is the Western boundary line of Berkley Plantation where the same is contiguous to the lands of complainants, and the title of the Defendants hereinafter named to the lands and interests therein East of Second Creek as now located is hereby confirmed in accordance with their respective interests as set out below which claim of title is quieted as against any claim of title adverse thereto on the part of the Complainants.

(C) Berkley Plantation is described as:

> That certain tract of land, or plantation known as "Berkeley" Plantation situated about sixteen (16) miles from the City of Natchez, in a Southeasterly direction and near the Woodville Road, and bounded as follows, to-wit:
>
> Bounded on the North by "Beverly" Plantation of A. and J. S. Fleming, formerly the property of John L. Helm, and a tract of land belonging to Mrs. I.

Lindsay, and the Overton Plantation of H. C. Buckley, the two latter tracts being formerly the property of Dr. Sanderson; and on the East by "Smith Land" Plantation, now owned by S. B. McCaleb, formerly Thorn; and on the South by Ellislie Plantation of Mrs. M. Ashford, formerly Thorn, and Second Creek; and on the West by Second Creek, and containing 1350 acres, more or less; being the same lands described and set forth in a certain deed from Stanley Carter Schuler to Myra Blake Schuler, dated March 29, 1938, recorded in Book 4-W, Page 225 of the Land Deed Records of Adams County, Mississippi, to which deed and record thereof reference is hereby made for a more particular description and deraignment of title.

That Berkley Plantation (less and except all of the oil, gas and other minerals in, on and under the same, and less and except any lease-hold or royalty rights, in, on, under or affecting said land), is owned by the following parties and in the following percentages, to-wit:

Myra Blake Schuler	1/3
Daniel C. Blake, also known as Daniel Carmichael Blake, also known as D. C. Blake	1/3
Hancock Bank, Trustee under the Will of Anna F. C. Martin for the lives of Anna Martin Eslick and Frederick Eslick, Jr., with remainder to the heirs at law of Anna F. C. Martin	1/6
Mary Blake Gorman, for life, with remainder to her children	1/6

(D) The minerals, leasing rights and bonus rights in, on and under the above described land are owned (subject to the royalty interests and lease-hold interests set out in Paragraph E) by the following persons and in the following percentages:

Janet Blake	14.5/1350
Paul U. Nones	23/1350
R. L. Dent	3/1350
Mary Blake Gorman	52/1350
Hancock Bank, Trustee under the Will of Anna F. C. Martin for the lives of Anna Martin Eslick, and Frederick Eslick, Jr., with remainder to the heirs at law of Anna F. C. Martin	225/1350
Myra Blake Schuler	450/1350
Eleanor R. Wallace	20/1350
Daniel C. Blake	337/1350
Mary Blake Gorman, for life with remainder in her children	225/1350

(E) The royalty interests are owned as follows:

TRACT ONE:

TRACT NORTH OF 1885 MEANDER AND WEST OF 1949 MEANDER OF SECOND CREEK (TRACT A)

A certain tract of land in Township 5 North, Range 3 West, Adams County, Mississippi, described as beginning at a point that is North (Grid) 2,754.3 feet and East (Grid) 860.3 feet from the Northwest corner of Section 25, Township 5 North, Range 3 West, said point of beginning being the West corner of the herein described tract; thence North 60 degrees 36-1/2 minutes East (Grid) 150.2 feet to a point for the North corner of the tract; thence with the 1949 meander of Second Creek, South 22 degrees 03 minutes East (Grid) 21.2 feet and South 08 degrees 15 minutes East (Grid) 69.0 feet to the point of intersection with the 1885 meander of Second Creek, said point being North (Grid) 2,740.1 feet and East (Grid) 1,009.1 feet from the northwest corner of Section 25, Township 5 North, Range 3 West; thence North 84 degrees 33 minutes West (Grid) 149.5 feet with the 1885 meander of Second Creek to the point of beginning.

The above described tract contains 0.151 of an acre, more or less. All bearings are grid, based on the Transverse Mercator Projection System for Mississippi, West Zone.

TRACT WEST OF 1885 MEANDER AND EAST OF 1949 MEANDER OF SECOND CREEK (TRACT B)

A certain tract of land in Township 5 North, Range 3 West, Adams County, Mississippi, described as beginning at a point that is North (Grid) 1,009.1 feet from the Northwest corner of Section 25, Township 5 North, Range 3 West, said point being at the intersection of the 1949 meander with the 1885 meander of Second Creek; thence with the 1885 meander of Second Creek, the following courses and distances:

South 84 degrees 33 minutes East (Grid) 23.1 feet,
South 61 degrees 56 minutes East (Grid) 51.0 feet,
South 51 degrees 01 minute East (Grid) 27.0 feet,
South 22 degrees 34 minutes East (Grid) 83.4 feet,
South 11 degrees 08 minutes East (Grid) 62.2 feet,
South 08 degrees 28 minutes West (Grid) 47.5 feet,
South 45 degrees 31 minutes West (Grid) 157.0 feet,
South 19 degrees 39 minutes West (Grid) 44.6 feet,
South 04 degrees 31 minutes West (Grid) 38.1 feet,
South 13 degrees 27 minutes East (Grid) 47.3 feet,
South 27 degrees 06 minutes East (Grid) 96.6 feet,
South 35 degrees 58 minutes East (Grid) 63.0 feet,
South 50 degrees 32 minutes East (Grid) 176.2 feet,
South 46 degrees 06 minutes East (Grid) 111.0 feet,
South 32 degrees 05 minutes East (Grid) 265.5 feet,
South 26 degrees 55 minutes East (Grid) 72.9 feet,
South 09 degrees 38 minutes East (Grid) 53.8 feet,
South 06 degrees 43 minutes West (Grid) 34.2 feet,
South 19 degrees 45 minutes West (Grid) 41.4 feet,
South 50 degrees 35 minutes West (Grid) 55.9 feet,
South 79 degrees 55 minutes West (Grid) 48.6 feet,
South 48 degrees 22 minutes West (Grid) 36.1 feet,

South 24 degrees 37 minutes West (Grid) 105.6 feet,
South 01 degrees 40 minutes West (Grid) 69.0 feet,
South 07 degrees 09 minutes East (Grid) 273.1 feet,
South 14 degrees 45 minutes East (Grid) 78.6 feet,
South 20 degrees 45 minutes East (Grid) 70.6 feet,
South 26 degrees 50 minutes East (Grid) 93.0 feet,
South 34 degrees 36 minutes East (Grid) 105.7 feet,
South 48 degrees 14 minutes East (Grid) 75.1 feet,
South 56 degrees 03 minutes East (Grid) 62.7 feet,
South 75 degrees 07 minutes East (Grid) 66.2 feet,
South 56 degrees 46 minutes East (Grid) 34.7 feet,
South 45 degrees 00 minutes East (Grid) 63.6 feet,
South 25 degrees 12 minutes East (Grid) 150.3 feet,
South 27 degrees 41 minutes East (Grid) 114.1 feet,
South 43 degrees 09 minutes East (Grid) 43.9 feet,
South 78 degrees 41 minutes East (Grid) 25.5 feet,
North 60 degrees 42-1/2 minutes East (Grid) 47.0 feet,
North 80 degrees 42 minutes East (Grid) 55.7 feet,
South 85 degrees 25 minutes East (Grid) 162.5 feet,
South 69 degrees 43 minutes East (Grid) 98.1 feet,
South 61 degrees 13 minutes East (Grid) 81.0 feet,
South 47 degrees 17 minutes East (Grid) 88.5 feet,
South 35 degrees 17 minutes East (Grid) 129.9 feet,
South 41 degrees 15 minutes East (Grid) 151.6 feet,
South 47 degrees 39 minutes East (Grid) 106.9 feet,

to the point of intersection with the 1949 meander of Second Creek, said point being South (Grid) 128.1 feet and East (Grid) 2,653.1 feet from the Northwest corner of Section 25, Township 5 North, Range 3 West; thence with the 1949 meander of Second Creek, the following courses and distances:

South 89 degrees 43 minutes West (Grid) 206.0 feet,
South 73 degrees 00 minutes West (Grid) 177.8 feet,
South 69 degrees 03 minutes West (Grid) 223.8 feet,
South 71 degrees 23 minutes West (Grid) 203.7 feet,

South 77 degrees 09 minutes West (Grid) 116.9 feet,
South 71 degrees 42 minutes West (Grid) 130.6 feet,
North 81 degrees 35 minutes West (Grid) 164.6 feet,
North 75 degrees 20 minutes West (Grid) 165.5 feet,
North 42 degrees 44 minutes West (Grid) 32.3 feet,
North 34 degrees 16 minutes West (Grid) 205.5 feet,
North 13 degrees 49 minutes West (Grid) 142.4 feet,
North 01 degrees 02 minutes West (Grid) 200.1 feet,
North 03 degrees 36 minutes West (Grid) 220.0 feet,
North 11 degrees 15 minutes West (Grid) 293.2 feet,
North 31 degrees 44 minutes West (Grid) 175.0 feet,
North 31 degrees 54 minutes West (Grid) 158.5 feet,
North 60 degrees 14 minutes West (Grid) 142.4 feet,
North 41 degrees 22 minutes West (Grid) 177.1 feet,
North 35 degrees 09 minutes West (Grid) 193.5 feet,
North 47 degrees 50 minutes West (Grid) 200.1 feet,
North 29 degrees 04 minutes West (Grid) 191.3 feet,
North 10 degrees 05 minutes East (Grid) 100.5 feet,
North 30 degrees 55 minutes East (Grdd) 161.0 feet,
North 47 degrees 39 minutes East (Grid) 126.9 feet,
North 47 degrees 10 minutes East (Grid) 104.5 feet,
North 45 degrees 10 minutes East (Grid) 151.9 feet,
North 57 degrees 52 minutes East (Grid) 150.2 feet,
North 45 degrees 13 minutes East (Grid) 143.0 feet,
North 39 degrees 30 minutes East (Grid) 127.5 feet,
North 14 degrees 20 minutes East (Grid) 154.3 feet,
North 05 degrees 33 minutes West (Grid) 122.0 feet,
North 08 degrees 15 minutes West (Grid) 31.3 feet
to the point of beginning.

The above described tract contains 50.443 acres, more or less. All bearings are grid, based on the Transverse Mercator Projection System for Mississippi, West Zone.

TRACT SOUTHWEST OF 1949 MEANDER AND NORTHEAST OF 1885 MEANDER OF SECOND CREEK (TRACT C)

A certain tract of land in Township five North, Range 3 West, Adams County, Mississippi, described as beginning at a point that is South (Grid) 128.1 feet and East (Grid) 2,653.1 feet from the Northwest corner of Section 25, Township 5 North, Range 3 West, said point of beginning being at the intersection of the 1949 meander with the 1885 meander of Second Creek; thence with the 1949 meander of Second Creek, the following courses and distances:

South 88 degrees 28 minutes East (Grid) 112.0 feet,
South 56 degrees 11 minutes East (Grid) 124.0 feet,
South 39 degrees 31 minutes East (Grid) 103.7 feet,
South 27 degrees 01 minutes East (Grid) 60.7 feet

to the point of intersection with the 1885 meander of Second Creek, said point being South (Grid) 334.2 feet and East (Grid) 2,961.7 feet from the northwest corner of Section 25, Township 5 North, Range 3 West; thence with the 1885 meander of Second Creek, North 65 degrees 06 minutes West (Grid) 52.5 feet and North 54 degrees 49 minutes West (Grid) 319.3 feet to the point of beginning.

The above described tract contains 0.389 of an acre, more or less. All bearings are grid, based on the Transverse Mercator Projection System for Mississippi, West Zone.

TRACT SOUTHWEST OF 1885 MEANDER EAST OF 1949 MEANDER, SECOND CREEK AND NORTH OF THE CENTER OF AN OLD CREEK BED (TRACT D)

A certain tract of land in Township 5 North, Range 3 West, Adams County, Mississippi, described as beginning at a point that is south (Grid) 334.2 feet and East (Grid) 2,961.7 feet from the northwest corner of Section 25, Township 5 North, Range 3 West, said point

of beginning being at the intersection of the 1949 meander with the 1885 meander of Second Creek; thence with the 1885 meander of Second Creek, the following courses and distances:

South 65 degrees 06 minutes East (Grid) 40.1 feet,
South 59 degrees 13 minutes East (Grid) 158.3 feet,
South 49 degrees 58 minutes East (Grid) 98.0 feet,
South 43 degrees 05 minutes East (Grid) 84.9 feet,
South 47 degrees 57 minutes East (Grid) 68.7 feet,
South 34 degrees 38 minutes East (Grid) 6.9 feet

to a point on an old stream bed; thence with the old stream bed, the following courses and distances:

South 83 degrees 01 minute West (Grid) 19.1 feet,
South 72 degrees 35 minutes West (Grid) 53.5 feet,

West (Grid) 50.0 feet, South 78 degrees 44 minutes West (Grid) 214.9 feet to the 1949 meander of Second Creek; thence with the 1949 meander of Second Creek, the following courses and distances:

North 00 degrees 33 minutes East (Grid) 190.0 feet,
North 04 degrees 37 minutes West (Grid) 99.3 feet,
North 27 degrees 01 minute West (Grid) 51.5 feet

to the point of beginning.

The above described tract contains 1.352 acres, more or less. All bearings are grid, based on the Transverse Mercator Projection System for Mississippi, West Zone.

Board of Deacons of Vicksburg Presbyterian Church	.002962960 of 1/8
R. L. Dent	.037569440 of 1/8
Mrs. E. C. Ward	.013471870 of 1/8
M. E. Ward	.010708910 of 1/8
Eleanor R. Wallace	.007407410 of 1/8
Hunter Jones	.005555550 of 1/8
Glenn O. Briscoe	.043554000 of 1/8

The Pure Oil Company	.045598140 of 1/8
W. W. Blocker	.015625000 of 1/8
Dr. Philip L. Shultz, Individually and as Trustee under the Will of S. B. Laub (payments credited to this interest, however, to be paid to R. Brent Forman and Philip L. Shultz, Co-Executors of the Estate of S. B. Laub until entry of a Final Decree in said Estate and certified copy thereof actually furnished to Humble Oil & Refining Company)	.00833333 of 1/8
S. H. Lambdin	.00377111 of 1/8
Southland Royalty Company	.03645926 of 1/8
Joseph F. Dixon	.00462963 of 1/8
Charles H. Osmond	.00007500 of 1/8
Florence C. Osmond	.00007500 of 1/8
Sunset International Petroleum Corporation	.00150000 of 1/8
A. A. Vestal, Trustee	.00135000 of 1/8
Veronica M. Hasty, Trustee for William C. Douglas, Jr.	.00030000 of 1/8
Veronica M. Hasty, Trustee for Elizabeth W. Douglas	.00015000 of 1/8
James H. Douglas, Jr.	.00015000 of 1/8
David Waller Dangler, Trustee	.00007500 of 1/8
H. Earle Muzzy	.00007500 of 1/8
Charles H. Perrault, Jr.	.06129232 of 1/8
Mary Blake Gorman, for life with remainder to her children. (Payments credited to this interest, however, are to be paid to Mary Blake Gorman during the term of her life, and until written notice of her death has been actually furnished to Humble Oil & Refining Company)	56.25/1350 of 1/8

Roy Field	5/1350 of 1/8
Mary Blake Gorman	23/1350 plus 2/3 of 43.5/1350 of 1/8
Eileen Gates Hunt	50/1350 of 1/8
Quintin Little	108.984375/1350 of 1/8
Raymond J. St. Germain, Jr., Lloyd P. Fadrique, Raymond B. Keating and L. C. Masterson, Jr., Testamentary Trustees under the Will of Raymond J. St. Germain	1.312/1350 of 1/8
Myra Blake Schuler	145/1350 of 1/8
F. H. Shortridge	5/1350 of 1/8
W. C. Spooner	5.63/1350 of 1/8
A. R. Wherritt	1.45/1350 of 1/8
Lester Settegast	½ of 56.25/1350 of 1/8
Richard C. Feltus, Sr.	5/1350 of 1/8
Betty G. Carter	5/1350 of 1/8
R. Lee Parker, Jr.	11.25/1350 of 1/8
Mary L. Ruthrough	1.107/1350 of 1/8
Kenneth Leith	1.107/1350 of 1/8
S. H. Davis	2.952/1350 of 1/8
C. K. Leith	4.428/1350 of 1/8
Midwest Oil Corporation	56.25/1350 of 1/8
Mary Ann Terzia	½ of 6.428/1350 of 1/8
Martha W. Schober	½ of 6.428/1350 of 1/8
J. F. Vaughan	5/1350 of 1/8
J. B. Williamson and/or Mrs. J. B. Williamson	17.1875/1350 of 1/8
Katherine Adger Atkins	4.095/1350 of 1/8
John B. Atkins, Jr.	1.365/1350 of 1/8
Caroline Atkins Crawford	1.365/1350 of 1/8

William J. Atkins (Royalty payments credited to the interest of Katherine Adger Atkins, Caroline Atkins Crawford, William J. Atkins and John B. Atkins, Jr., are to be paid to John B. Atkins, Jr., individually and as Agent and Attorney in Fact for Katherine Adger Atkins, Caroline Atkins Crawford and William J. Atkins until revocation of power of attorney and written notice thereof has been furnished to Humble Oil & Refining Company)	1.365/1350 of 1/8
Janet Blake	1/3 of 43.5/1350 of 1/8
Bank of Southwest and Robert W. Davis, Jr., Trustees under the Will of Paul B. Wittman, Deceased	½ of 56.25/1350 of 1/8
Andrew Leith, Jr.	1/3 of 2.214/1350 of 1/8
David Leith	1/3 of 2.214/1350 of 1/8
Hancock Bank, Gulfport, Mississippi, Trustee under the Will of Anna F. C. Martin for the lives of Anna Martin Eslick and Frederick Eslick, Jr., with remainder to the heirs at law of Anna F. C. Martin	4/5 of 225/1350 of 1/8
Fredeen Beaird Herring	1/2 of 14.0625/1350 of 1/8
Lafayette Brown Herring, Jr.	1/4 of 14.0625/1350 of 1/8

Fredeen Beaird Herring, Trustee for Fred Herring	1/4 of 14.0625/1350 of 1/8
R. E. Welch	5/1350 of 1/8
Paul U. Nones	23/1350 of 1/8
(Payments credited to the interest of Paul U. Nones are to be paid to The Merchants National Bank and Trust Company of Vicksburg, Mississippi, for deposit to the account of Paul U. Nones until written authority has been revoked and written notice thereof has been furnished to Humble Oil & Refining Company)	
Irma Moore Elliott	½ of 11.25/1350 of 1/8
Harry W. Elliott, Jr.	½ of 11.25/1350 of 1/8
Owen D. Elliott	1/8 of 11.25/1350 of 1/8
Irma Moore Elliott and Harry W. Elliott, Jr., Trustees for Michael Elliott, Kelly Elliott and Casey Elliott	1/8 of 11.25/1350 of 1/8
The Pure Oil Company	18/1350 of 1/8
W. B. McCarty	½ of 10/1350 of 1/8
Deposit Guaranty Bank & Trust Co., Elise Holman and W. Henry Holman, Jr., Co-executors of Estate of William Henry Holman, Deceased	½ of 10/1350 of 1/8
Janet Gale Leith	1/3 of 2.214/1350 of 1/8
Ruth Blanks Green	10/1350 of 1/8
(Payments credited to this interest are to be paid to Ruth Blanks Green, Executrix of the Estate of W. G. Green, deceased, until such time as there has been an entry of a final decree in said estate and certified copy	

thereof actually furnished to Humble Oil & Refining Company)

TRACT TWO:

As to all of Berkley Plantation, less and except the lands described in Tract One:

Mary Blake Gorman, for life with remainder to her children. (Payments credited to this interest however, are to be paid to Mary Blake Gorman during the term of her life and until written notice of her death has been actually furnished to Humble Oil & Refining Company)	56.25/1350 of 1/8
W. W. Blocker	42.1875/1350 of 1/8
Board of Deacons of Vicksburg Presbyterian Church	8/1350 of 1/8
R. L. Dent	101.4375/1350 of 1/8
Joseph F. Dixon	12.5/1350 of 1/8
Roy Field	5/1350 of 1/8
Mary Blake Gorman	23/1350 plus 2/3 of 43.5/1350 of 1/8
Eileen Gates Hunt	50/1350 of 1/8
Hunter Jones	15/1350 of 1/8
S. H. Lambdin	10.182/1350 of 1/8
Quintin Little	108.984375/1350 of 1/8
Charles H. Osmond	2% of 10.125/1350 of 1/8
Raymond J. St. Germain, Jr., Lloyd P. Fadrique, Raymond B. Keating and L. C. Masterson, Jr., Testamentary Trustees under the Will of Raymond J. St. Germain	1.312/1250 of 1/8
Myra Blake Schuler	145/1350 of 1/8
F. H. Shortridge	5/1350 of 1/8

Southland Royalty Company	98.44/1350 of 1/8
W. C. Spooner	5.63/1350 of 1/8
Mrs. E. C. Ward	36.9140625/1350 of 1/8
M. E. Ward	28.9140625/1350 of 1/8
A. R. Wherritt	1.45/1350 of 1/8
Lester Settegast	1/2 of 56.25/1350 of 1/8
Richard C. Feltus, Sr.	5/1350 of 1/8
Betty G. Carter	5/1350 of 1/8
R. Lee Parker, Jr.	11.25/1350 of 1/8
Mary L. Rutrough	1.107/1350 of 1/8
Kenneth Leith	1.107/1350 of 1/8
S. H. Davis	2.952/1350 of 1/8
C. K. Leith	4.428/1350 of 1/8
Midwest Oil Corporation	56.25/1350 of 1/8
Eleanor R. Wallace	20/1350 of 1/8
Mary Ann Terzia	1/2 of 6.428/1350 of 1/8
Martha W. Schober	1/2 of 6.428/1350 of 1/8
J. F. Vaughan	5/1350 of 1/8
J. B. Williamson and/or Mrs. J. B. Williamson	17.1875/1350 of 1/8
Sunset International Petroleum Corporation	40% of 10.125/1350 of 1/8
A. A. Vestal, Trustee	36% of 10.125/1350 of 1/8
Veronica M. Hasty, Trustee for William C. Douglas, Jr.	8% of 10.125/1350 of 1/8
Veronica M. Hasty, Trustee for Elizabeth W. Douglas	4% of 10.125/1350 of 1/8
James H. Douglas, Jr.	4% of 10.125/1350 of 1/8
David Waller Dangler, Trustee	2% of 10.125/1350 of 1/8
H. Earle Muzzy	2% of 10.125/1350 of 1/8
Florence C. Osmond	2% of 10.125/1350 of 1/8
Katherine Adger Atkins	4.095/1350 of 1/8
John B. Atkins, Jr.	1.365/1350 of 1/8
Caroline Atkins Crawford	1.365/1350 of 1/8
William J. Atkins	1.365/1350 of 1/8

(Royalty payments credited to the interest of Katherine Adger Atkins, Caroline Atkins Crawford, William J. Atkins and John B. Atkins, Jr., are to be paid to John B. Atkins, Jr., individually and as Agent and Attorney in Fact for Katherine Adger Atkins, Caroline Atkins Crawford and William J. Atkins until revocation of power of attorney and written notice thereof has been served on Humble Oil & Refining Company)

Janet Blake	1/3 of 43.5/1350 of 1/8
Bank of the Southwest and Robert W. Davis, Jr., Trustees under the Will of Paul B. Wittman	1/2 of 56.25/1350 of 1/8
Andrew Leith, Jr.	1/3 of 2.214/1350 of 1/8
David Leith	1/3 of 2.214/1350 of 1/8
Hancock Bank, Gulfport, Mississippi, Trustee under the will of Anna F. C. Martin for the lives of Anna Martin Eslick and Frederick Eslick, Jr., with remainder to the heirs at law of Anna F. C. Martin	4/5 of 225/1350 of 1/8
Fredeen Beaird Herring	1/2 of 14.0625/1350 of 1/8
Lafayette Brown Herring, Jr.	1/4 of 14.0625/1350 of 1/8
Fredeen Beaird Herring, Trustee for Fred Herring	1/4 of 14.0625/1350 of 1/8
R. E. Welch	5/1350 of 1/8
Paul U. Nones	23/1350 of 1/8

(Payments credited to this interest are to be paid to The Merchants National Bank and Trust Company of Vicksburg, Mississippi, for deposit to the ac-

of Paul U. Nones until its authority has been revoked and written notice thereof has been furnished to Humble Oil & Refining Company)	
Irma Moore Elliott	1/2 of 11.25/1350 of 1/8
Harry W. Elliott, Jr.	1/4 of 11.25/1350 of 1/8
Owen D. Elliott	1/8 of 11.25/1350 of 1/8
The Pure Oil Company	18/1350 of 1/8
W. B. McCarty	1/2 of 10/1350 of 1/8
Deposit Guaranty Bank & Trust Company, Elise Holman and W. Henry Holman, Jr., Co-Executors of the Estate of William Henry Holman, Deceased	1/2 of 10/1350 of 1/8
Janet Gale Leith	1/3 of 2.214/1350 of 1/8
Ruth Blanks Green	10/1350 of 1/8
(Payments credited to this interest are to be paid to Ruth Blanks Green, Executrix of the Estate of W. G. Green, deceased, until such time as there has been an entry of a final decree in said estate and certified copy thereof actually furnished Humble Oil & Refining Company)	
Irma Moore Elliott and *Henry* W. Elliott, Jr., Trustees for Michael Elliott, Kelly Elliott and Casey Elliott	1/8 of 11.25/1350 of 1/8
Dr. Philip L. Shultz, Individually and as Trustee under the Will of S. B. Laub (Payments credited to this interest, however, are to be paid to R. Brent Forman and Philip L. Shultz, Co-Executors of the Estate of S. B. Laub until entry of a Final Decree in said Estate and certified copy thereof	

actually furnished to Humble Oil & Refining Company) 22.5/1350 of 1/8

Those royalty interests originally created by the deeds hereinafter set out, are non-participating as to bonus payments and delay rentals and were for original terms of ten years and as long thereafter as production was had as defined in said deeds, the names of the Grantors, Grantees, dates and recording data being as follows:

(1) Deed from Myra Blake Schuler to E. G. Morehead dated April 10, 1945, and recorded in Book 14 at page 277 of the Oil and Gas Records.

(2) Deed from H. L. Blake to E. G. Morehead dated April 11, 1945, and recorded in Book 14 at Page 275 of the Oil and Gas Records.

(3) Deed from C. F. Blake to E. G. Morehead April 10, 1945, and recorded in Book 14 at Page 211 of the Oil and Gas Records.

(4) Deed from Myra Blake Schuler to Eileen Gates Hunt dated September 22, 1945, and recorded in Book 15 at Page 412 of the Oil and Gas Records.

(5) Deed from Caroline F. Blake to A. B. Kirkpatrick dated July 12, 1946, and recorded in Book 19 at Page 62 of the Oil and Gas Records.

(6) Deed from D. W. Blake to Southland Royalty Company dated July 11, 1946 and recorded in Book 19 at Page 92 of the Oil and Gas Records.

(7) Deed from Caroline F. Blake to Southland Royalty Company dated July 12, 1946 and recorded in Book 19 at Page 92 of the Oil and Gas Records.

(F) Humble Oil & Refining Company is the owner of 29/30th of the leasehold interests covering all of Berkley Plantation created by the following instruments, which instruments are presently valid and sibsisting:

1. Oil, Gas and Mineral Lease from Gaillard Martin, et als, to Humble Oil & Refining Company dated April 21, 1945, of record in Book 14 at Page 365 of the Records in the office of the Clerk of the Chancery Court of Adams County, Mississippi, as ratified by instrument executed by J. Gaillard Martin, Individually and as sole surviving Trustee under the Last Will and Testament of Anna F. C. Martin, deceased, et als, recorded in Book 37 at Page 506 of said records, and as ratified by instrument executed by Frederick Martin Eslick, recorded in Book 20, at Page 59 of said records.

2. Oil, Gas and Mineral Lease executed by Myra Blake Schuler to Humble Oil & Refining Company dated April 21, 1945, recorded in Book 14 at Page 441 of the records aforesaid.

3. Oil, Gas and Mineral Lease executed by Henry L. Blake to Humble Oil & Refining Company dated April 21, 1945, recorded in Book 14 at Page 445 of the records aforesaid.

4. Oil, Gas and Mineral Lease from D. W. Blake to Humble Oil & Refining Company dated April 21, 1945, recorded in Book 14 at Page 359 of the records aforesaid.

5. Oil, Gas and Mineral Lease executed by Caroline F. Blake to Humble Oil & Refining Company dated April 21, 1945, recorded in Book 12 at Page 368 of the records aforesaid.

(G) By reason of the conflicting claims of title to the lands involved in this litigation, the Humble Oil & Refining Company has been suspending the payment of royalties as to the interests in litigation. As of the time of the trial of this suit, as shown by evidence submitted herein, the total suspended royalty was Eighty-Two Thousand Two Hundred Ninety-Two and 57/100 ($82,292.57) Dollars. By Decree entered in this cause on the 7th day of August, 1963, certain Defendants therein named, who also appear

in the schedule below, were charged with the payment by them of their proportionate share of the expense and attorneys' fees incurred by the remaining Defendants in the prosecution of the defense of this suit, all as authorized by Section 1583.5 of the Mississippi Code of 1942. Pursuant to the provisions of said Statute, the Court finds and does hereby adjudge that a reasonable attorney's fee for the defense of this litigation would be Eighteen Thousand Five Hundred and No/100 ($18,500.00) Dollars, and the Court further finds and does adjudge that there has been incurred in the defense of this suit expenses in the sum of One Thousand One Hundred Seven and No/100 ($1,107.00) Dollars, paid to Forrestry Consultants, Inc., and expenses in the sum of Eight Hundred ($800.00) Dollars paid to Austin B. Smith, which expenses the Court finds to be reasonable, making a total of Twenty Thousand Four Hundred Seven and no/100 ($20,407.00) Dollars by way of attorney's fees and expenses. It is therefore, ordered, adjudged and decreed that the interest of the following Defendants shall be charged with their respective pro rata portion of said fees and expenses, which amount approximates, but is less than twenty-five (25%) per cent of the moneys in suspense, and that said Defendants are indebted jointly to Teller, Biedenharn and Rogers, Gwin and Gwin and Dent, Ward, Martin and Terry, in the respective amounts as follows:

Owner	Fractional Interest	Pro Rata Portion of Fees & Expenses
R. C. Feltus	5/1350	64.44
R. Lee Parker, Jr.	11.25/1350	145.00
Eileen G. Hunt	50/1350	644.44
J. F. Vaughan	5/1350	64.44
F. H. Shortridge	5/1350	64.44
Roy Field	5/1350	64.44
Quintin Little	108.984375/1350	1,404.69
R. E. Welch	5/1350	64.44
Irma Moore Elliott	1/2 of 11.25/1350	72.50
Harry W. Elliott, Jr.	1/4 of 11.25/1350	36.25
Owen D. Elliott	1/8 of 11.25/1350	18.13
Irma Moore Elliott and Henry W. Elliott, Jr. Trustees for Michael Elliott, Kelly Elliott and Casey Elliott	1/8 of 11.25/1350	18.13
Midwest Oil Corporation	56.25/1350	725.00

It is further ordered, adjudged and decreed that a lien for the payment of the said sums of money is hereby impressed upon the funds in the hands of Humble Oil & Refining Company, and said Humble Oil & Refining Company is hereby directed to pay said sums of money on behalf of the above named Defendants to the aforesaid firms of Attorneys, jointly, and to charge the respective amounts thereof against the ultimate sums of money to be paid to said defaulting Defendants.

(H) The Humble Oil & Refining Company subject to the last sentence hereof is hereby directed to pay to the respective owners of the suspended royalty such sums of money which are now due or which may hereafter be placed in suspense as a result of this litigation, said payments to be made to the parties and in the proportions

set out in the royalty schedules above set out, after having first deducted the sums of money by way of attorneys' fees and expenses as set out in Paragraph *H* of this Decree. The Court makes no decision as to any controversy between Hancock Bank, Gulfport, Mississippi, Trustee under the will of Anna F. C. Martin, for the life of Anna Martin Eslick and Frederick Eslick, Jr., with the remainder to the heirs at law of Anna F. C. Martin and Humble Oil & Refining Company, including any claim that Humble Oil & Refining Company make an overpayment of royalties to the said Hancock Bank, as Trustee, which controversy was specifically excepted from this litigation by the stipulations set out in Paragraph J.

(J) Humble Oil & Refining Company, on the one hand, and Hancock Bank, Gulfport, Mississippi, Trustee under the will of Anna F. C. Martin, and the beneficiaries under the trust created by said Will (with the exception of Mable W. Martin and those claiming title under the said Mabel W. Martin) entered into a Stipulation filed in this cause, which stipulation reads as follows:

> "It is stipulated and agreed by and between Humble Oil & Refining Company on the one hand and the Hancock Bank, Gulfport, Mississippi, Trustee under the will of Anna F. C. Martin, and the beneficiaries under the trust created by said will (with the exception of Mabel W. Marten and those claiming title under the said Mabel W. Martin *and those claiming title under the said Mabel W. Martin*) as follows:
>
> "ONE. That insofar as the stipulating parties are concerned that they consent that this suit proceed to trial and final decree for the purpose of establishing the boundary line between Berkley Plantation on the one hand and the lands of the Complainants on the other hand.
>
> "TWO. That this litigation will be without prejudice to and in no way affect the claim on the part

of Hancock Bank, Gulfport, Mississippi, Trustee, and the beneficiaries under the testamentary trust created by the will of Anna F. C. Martin (other than the claims of Mabel W. Martin and those claiming under her) to the proper payment of any royalty which has been paid, suspended or is being suspended as a result of any claims other than the disputed boundary claim involved in this litigation.

"THREE. That this litigation will be without prejudice to and will in no way affect the claim or defense of Humble Oil & Refining Company to any royalties paid, suspended or to be suspended for reasons other than the location of the disputed boundary involved in this litigation; and the parties hereto leave open the question of whether or not Humble Oil & Refining Company is obligated to pay royalties to said Trustee or beneficiaries on the 1/30th interest claimed by Mabel W. Martin and her grantees and identified in suit of Mabel W. Martin, et als v. Humble Oil & Refining Company tried and concluded in Civil Action No. 806 in the United States District Court for the Western Division for the Southern District of Mississippi."

It is, therefore ordered, adjudged and decreed that nothing herein contained shall in any way affect said stipulation.

(J) The names of certain of the Defendans have been spelled or written variously, but the Court finds and does adjudge that the individuals listed below, regardless of the variance in the spelling of their names, are one and the same person, respectively, to-wit:

Anna F. B. Eslick and Anna F. C. Eslick;

Lehlia Hennington, Lehlia Hennington Terry and Lillian Hennington Terry;

Quintin Little and Quinton Little;
E. C. Ward, Mrs. E. C. Ward and Ellena C. Ward;
Daniel C. Blake and D. C. Blake;
Richard C. Feltus, R. C. Feltus and Richard C. Feltus, Sr.;
H. Earl Muzzy and H. Earle Muzzy;
John Robinson and John B. Robinson;
Frank R. Robinson and Frank Robinson, Jr.;
Forea Mazique and Ferea Mazique;
Elizabeth Klug and Elizabeth Klugh;
Mary Gordon Leith, Mary L. Rauthbrough, Mary L. Ruthrough, Mary Gordon Leith Ruthrouge and Mary L. Rutrough;
Mabel Martin Campbell and Mabel W. Martin;
Layfayette Brown Herring, Jr., and L. B. Herring, Jr.;
L. C. Gwin and Lucien C. Gwin; Glen O. Briscoe and Glenn O. Briscoe

(K) The Court further finds and does hereby adjudge and decree that it has had under its continuing oversight the interest of all minor defendants appearing in this cause, and has given such minors the same protection as they would have been given if a Guardian ad litem had been appointed and an Answer by a Guardian ad litem had been filed herein, and the Court does specifically adjudge

and decree that the appointment of a Guardian ad litem for such minor defendants is not necessary.

(L) The surface ownership is subject to that certain surface lease granted by D. C. Blake to N. Leslie Carpenter and Beverly V. Thompson, Jr., dated March 9, 1958 and recorded in Deed Book 8-K at page 455.

(M) The making of a final record in this cause is dispensed with and in lieu thereof the Clerk is directed to record a copy of this decree on the Deed Records in his office, the cost of which shall be added to the cost of this proceeding.

(N) The costs of this proceeding are assessed to the Complainants for all of which let execution issue.

(O) The Complainants having given notice in open Court of their desire to perfect an appeal from the decision rendered herein and praying for an appeal, it is therefore Ordered, Adjudged and Decreed that the Complainants are granted an appeal to the Supreme Court of the State of Mississippi upon taking the necessary procedural steps required to perfect said appeal. Any payments of moneys required to be made under the terms of this Decree by the Humble Oil & Refining Company are hereby abated during the statutory period provided for the perfecting of an appeal. If any party hereto perfects an appeal without supersedeas the Humble Oil & Refining Company shall have the option either to pay the sums of money herein required by it to be paid or to suspend their payment during the period of the appeal until a judgment has been entered finally adjudicating the rights of all parties hereto with no further rights of appeal, such judgment to be entered by a Court of competent jurisdiction. In the event this decree is affirmed as a Final Decree insofar as the denial of of the rights of Complainants are concerned, as against

any payments which have not been made by Humble Oil & Refining Company and required to be made under this decree, such unpaid amounts shall bear interest at six (6%) per cent per annum.

(P) The letter opinion of the Court dated November 26, 1963, addressed to L. C. Gwin of Gwin & Gwin, with copies going to all Counsel, is by reference made a part of the record.

ORDERED, ADJUDGED AND DECREED this the 7th day of February, 1964.

Walter D. Coleman
Chancellor

Filed for record in my office this 7 day of Feb. A. D., 1964.

Robert E. Burns, Chan. Clerk
By Shirley Merritt, D. C.

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APPENDIX "F"

Title 28 *United States Code*:

Section 1257(3):

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity

is specially set up or claimed under the Constitution, treaties or statutes of, our commission held or authority exercised under, the United States."

Section 2101(c):

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

APPENDIX "G"

United States Constitution:

Fourteenth Amendment:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."